

*United States Court of Appeals
for the Second Circuit*



APPENDIX

74-2347

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 74-2347

ARTHUR S. KURLAN, et al.,

Appellants,

-against-

HOWARD H. CALLAWAY, SECRETARY OF THE
ARMY, MALCOLM WILSON, GOVERNOR OF THE
STATE OF NEW YORK and MAJOR GENERAL
JOHN C. BAKER, COMMANDING GENERAL,
NEW YORK ARMY NATIONAL GUARD,

Appellees.

JOINT APPENDIX

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Foley Square
New York, New York 10007



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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ARTHUR S. KURLAN, et al.,

Appellants,

-against-

HOWARD H. CALLAWAY, SECRETARY OF
THE ARMY, MALCOLM WILSON, GOVERNOR
OF THE STATE OF NEW YORK and MAJOR
GENERAL JOHN C. BAKER, COMMANDING
GENERAL, NEW YORK ARMY NATIONAL
GUARD,

Appellees.

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UNITED STATES COURT OF APPEALS

Second Circuit



At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the **seventeenth** day of **October**, one thousand nine hundred and **seventy-four**.

Arthur S. Kurlan, et. al.,
Plaintiff-Appellants,
v.

Howard H. Callaway, Secretary of the Army, Malcolm Wilson, Governor of the State of New York and Mayor John C. Baker, Commanding General, New York Army National Guard.

Defendants-Appellees.

It is hereby ordered that the motion made herein by counsel for the

appellant **appellee** **petitioner** **respondent**

by notice of motion dated October 15, 1974 to continue the stay granted by the United States District Court for the Southern District of New York and for a preference.

be and it hereby is granted -denied-

It is further ordered that the appellant shall file a brief and joint appendix on or before October 31, 1974, in default of which the court shall enter an order dismissing the appeal and vacating the stay; that the appellee shall file a brief on or before November 14, 1974; and that the appeal shall be set for argument during the week of November 19, 1974.

A. DANIEL FUSARO, Clerk
By Edward J. Guardaro
Senior Deputy Clerk

BEFORE: HON. JOHN A. DANAHER

HON. WILFRED FEINBERG

HON. WILLIAM H. MILLIGAN

(ORDER OF UNITED STATES COURT OF APPEALS) Circuit Judges

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Wilson and Baker cross-move for an order pursuant to

Rules 12(b)(1) and (6), (h)(3) and 56(b). Fed. R. Civ. P.

COPY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
ARTHUR S. KURLAN, et al.,

Plaintiffs, 74 Civ. 2986
-against-

HOWARD H. CALLAWAY, SECRETARY OF
THE ARMY, MALCOLM WILSON, GOVERNOR
OF THE STATE OF NEW YORK and MAJOR
GENERAL JOHN C. BAKER, COMMANDING
GENERAL, NEW YORK ARMY NATIONAL
GUARD,

ORDER

Defendants.

-----x
Upon the application of plaintiffs pursuant to Rule 62(c)
of the Federal Rules of Civil Procedure, the affidavit of Steven
J. Hyman submitted in behalf thereof, and upon the opinion of this
Court filed the 24th day of September, 1974 and the judgment of
this Court entered the 6th day of October, 1974 denying plain-
tiffs' request for preliminary injunction and granting defendants
Wilson and Baker summary judgment, and upon all other papers and
proceedings heretofore had herein, and after hearing oral argument
by counsel for plaintiffs and counsel for defendants Wilson and
Baker, and after due deliberation, it is

ORDERED that plaintiffs' application for a stay and
injunction pursuant to Rule 62(c) of the Federal Rules of Civil
Procedure is granted to the extent set forth below; and it is
further

ORDERED that defendants shall be enjoined from requiring
plaintiffs to attend New York Army National Guard unit training
assemblies for the period of 10 days from the date hereof in order
to permit plaintiffs sufficient time to make application to the
United States Court of Appeals for the Second Circuit for the
further continuation of said stay pending appeal of the decision
and judgment herein; and it is further

(ORDER OF JUDGE WARD GRANTING STAY)

of the State of New York.

ORDERED, that this stay shall terminate upon the
expiration of ¹⁰ ~~10~~ days from the date of filing of this order,
unless extended by order of this Court or the Court of Appeals
for the Second Circuit.

s/ Robert J WARD

US DJ

Dated: New York, New York
October ~~9~~, 1974
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3.

at issue, since the legislative history does not indicate
what the intent of Congress was in enacting subsection (g).

The Court is of the view that the

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
ARTHUR S. KURLAN, et al.,

Plaintiffs,

NOTICE OF APPEAL

-against-

HOWARD H. CALLAWAY, Secretary of the
Army, MALCOLM WILSON, Governor of
the State of New York and MAJOR
JOHN C. BAKER, Commanding General,
New York Army National Guard,

74 Civ. 2986

Defendants.

-----x
SIR :

PLEASE TAKE NOTICE that the plaintiffs, by their
attorneys, KUNSTLER KUNSTLER HYMAN & GOLDBERG, hereby appeal
to the United States Court of Appeals for the Second Circuit
from the opinion of this Court filed September 24, 1974 and from
the order and judgment denying plaintiffs' motion for preliminary
and permanent injunction and granting the defendants' motion
for summary judgment, and from each and every part thereof, filed
on the 9th day of October, 1974.

Dated: New York, New York
October 9, 1974

Yours, etc.,

KUNSTLER KUNSTLER HYMAN & GOLDBERG
Attorneys for Plaintiffs
Office & P.O. Address
370 Lexington Avenue
New York, New York 10017

TO:

Clerk,
U.S. District Court
Southern Dis. of New York
U.S. Courthouse
Foley Square
New York, New York 10007

HON. LOUIS J. LEFKOWITZ
Attorney General
Two World Trade Center
New York, New York 10047
Attorney for Defendants
Wilson and Baker

HON. PAUL J. CURRAN
United States Attorney
Southern District of N.Y.
U.S. Court House
Foley Square
New York, New York 10007
Attorney for Defendant
Callaway

Exhibit

4

B (NOTICE OF APPEAL)

The National Guard, while something of a hybrid under both
state and federal control, is basically a state organization.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
ARTHUR S. KURLAN, et al., :

Plaintiffs, :

-against- : JUDGMENT

HOWARD H. CALLAWAY, Secretary of the : 74 Civ. 2986
Army, MALCOLM WILSON, Governor of
the State of New York and MAJOR :
JOHN C. BAKER, Commanding General,
New York Army National Guard, :

Defendants. :
-----X

The plaintiffs having moved for a preliminary injunction and the defendants Malcolm Wilson, Governor of the State of New York and Major General John C. Baker, NYARNG, Chief of Staff to the Governor, having moved to dismiss the complaint, or for summary judgment and said motions having been argued before the Court and due deliberation thereon having been had, upon the memorandum decision of the Court filed September 24, 1974, it is

ORDERED that plaintiffs' motion for a preliminary injunction is denied in all respects; and it is further

ORDERED that said defendants' motion for summary judgment is granted in all respects; and it is further

ORDERED AND ADJUDGED that summary judgment be granted in favor of the defendants Malcolm Wilson, Governor of the State of New York and Major General John C. Baker, NYARNG, Chief of Staff to the Governor, and against the plaintiffs, and the Clerk is accordingly directed to enter judgment, dismissing the complaint.

Dated: New York, New York
October 4, 1974

U. S. D. J.

(JUDGMENT)

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ARTHUR S. KURLAN, et al.,

Plaintiffs, 74 Civ. 2986
-against- R.J.W.

HOWARD H. CALLAWAY, SECRETARY OF THE
ARMY, MALCOLM WILSON, GOVERNOR OF THE
STATE OF NEW YORK and MAJOR GENERAL
JOHN C. BAKER, COMMANDING GENERAL,
NEW YORK ARMY NATIONAL GUARD,

Defendants.

Plaintiffs, who are members of the New York National Guard ("the National Guard"), move for an order pursuant to Rule 65, Fed. R. Civ. P., granting a preliminary injunction against defendants Howard H. Callaway, Secretary of the Army, Malcolm Wilson, Governor of the State of New York, and John C. Baker, Commanding General of the National Guard. Defendants Wilson and Baker cross-move for an order pursuant to Rules 12(b)(1) and (6), (h)(3) and 56(b), Fed. R. Civ. P., dismissing this action or granting summary judgment as to them.

This case presents questions as to the construction and application of 10 U.S.C. §269(e)(2) and (g) which were

first presented to this Court in Mela v. Callaway, 74 Civ. 2153. The facts, which form the basis for this litigation, are more fully set forth in this Court's decision in that case. Plaintiffs, as in Mela, have completed or are about to complete their fifth year of service in the National Guard, a component of the Ready Reserve Forces of the United States, and were serving on active duty for training when their units were activated for service by the President during the postal strike in 1970 ("Operation Graphic Hand"). They seek a transfer to the Standby Reserve on the grounds that their continued participation in the National Guard and the Ready Reserve is contrary to 10 U.S.C. §269(e)(2), Army Regulation 135-91, ¶17(b), and this Court's decision in Mela.

The Court has jurisdiction pursuant to 42 U.S.C. §1983 and 28 U.S.C. §§ 1343 and 1361 inasmuch as the plaintiffs claim a denial of their civil rights by defendants Wilson and Baker acting under color of state law and because the relief plaintiffs seek from defendant Callaway is in the nature of mandamus.

The parties are agreed that the only question here involved which was not before the Court in Mela is the effect to be given to Executive Order No. 1¹ issued July 10, 1974.

Executive Order No. 8 purports to withdraw the Governor's consent to the transfer of certain National Guardsmen to the Standby Reserve. The affected Guardsmen, who are otherwise qualified for transfer, did not serve with their units during Operation Graphic Hand because they were already performing their required active duty for training at various Army posts in the United States.

Plaintiffs contend that the Governor is without authority to withhold his consent to transfer from these Guardsmen solely on the basis of the nature of their active duty service and that such a distinction between Guardsmen who have performed active duty denies them equal protection of the laws. U.S. Const., Amend. XIV. In the alternative, they argue that Executive Order No. 8 cannot be applied to those Guardsmen who qualified for transfer prior to the date of its issuance.

The first of plaintiffs' contentions must be rejected on the basis of this Court's decision in Mela. In Mela, this Court held that the consent of the Governor, under 10 U.S.C. §269(g), was required before a member of the National Guard could be transferred to the Standby Reserve in conformity with 10 U.S.C. §269(e)(2). The statute, then, vests the Governor with discretion. However, before that

cretion as commander-in-chief of the National Guard, since the Governor exercised his discretion when he granted his consent in his Proclamation and Executive Order No. 39.

Accordingly, plaintiffs' motion for a preliminary

discretion may operate, there must be compliance with the requirements of subsection 269(e)(2), chief among which is the requirement that a Reservist have served on active duty other than for training. Therefore, it is clear that the statute authorizes the Governor to distinguish between Reservists who have performed active duty service. In Executive Order No. 8, the Governor has not attempted an unauthorized redefinition of active duty, but rather has identified that group, among all those who have performed the requisite active duty, to whom he grants consent to transfer. Although the Governor might have exercised his discretion on an individual, case-by-case basis, he was not compelled to do so. Cf. Fook Hong Mak v. Immigration and Naturalization Service, 435 F.2d 728 (2d Cir. 1970). This Court, therefore, concludes that Executive Order No. 8 is within the authority granted the Governor under subsection 269(g).

The next question, then, becomes to whom Executive Order No. 8 applies. This Court agrees with defendants Wilson's and Baker's contention that it applies to any member of the National Guard who had not been transferred prior to its issuance, including those plaintiffs who were eligible for transfer prior to July 10, 1974. The discretion granted the Governor under subsection 269(g) operates between the

NOTES

1 "Except in time of war or of national emergency declared by Congress, a Reserve who is not on active duty, or who is on active duty for training, shall, upon his request, be transferred to the

time a Guardsman becomes eligible for transfer and the actual transfer. Thus, the Governor is free to consent, withhold consent or withdraw consent previously granted until the actual transfer is carried out. An individual or agency vested with discretion is free to change the manner in which that discretion is exercised. Cf. Securities and Exchange Commission v. Chenery Corp., 332 U.S. 194 (1947); NLRB v. National Container Corp., 211 F.2d 525 (2d Cir. 1954); Kelly v. United States Department of Interior, 339 F. Supp. 1095 (E.D. Cal. 1972); Fraenkel v. United States, 320 F. Supp. 605 (S.D.N.Y. 1970).

Nothing in this Court's decision in Mela is to the contrary. There, the Court said that if the Governor did not intend his consent to extend to Guardsmen who had been on active duty for training he could have so modified his order granting consent. (Mem. Dec. at 7). In conformity with this Court's decision, the Governor has now unequivocally modified his consent. Plaintiffs have suffered no undue hardship in reliance on the Governor's consent such as might estop its withdrawal. Hornstein v. Laird, 327 F. Supp. 993 (S.D.N.Y. 1971), cited by plaintiffs, is inapposite as there Judge Bonsal found that subsection 269(e) vested no discretion in the Army.

by the President of the United States, and do hereby authorize and direct the Chief of Staff to the Governor to accept applications for such transfers and institute appropriate processes to effect transfer of qualified applicants as soon as possible."

Plaintiffs further argue that Executive Order No. 8 denies them equal protection of the laws and violates 2
10 U.S.C. §277. In a case such as this one, where the Court is reviewing an order promulgated by the Governor in his capacity as Commander-in-Chief of the National Guard, the Court's power is "extraordinarily limited." Roth v. Laird, 446 F.2d 855, 856 (2d Cir. 1971); Feliciano v. Laird, 426 F.2d 424, 427 (2d Cir. 1970). "[P]urely discretionary decisions by military officials which are within their valid jurisdiction will not be reviewed." Smith v. Resor, 406 F.2d 141, 145 (2d Cir. 1969). This is not the rare case where the military decision is so arbitrary and irrational as to require this Court's intervention. See Roth v. Laird, supra; Feliciano v. Laird, supra. Section 277 of Title 10 U.S.C. is inapplicable as by its terms it covers only "laws applying to both Regulars and Reserves." Winters v. United States, 412 F.2d 140 (9th Cir. 1969).

For all the foregoing reasons, plaintiffs' motion for a preliminary injunction is denied and defendants Wilson's and Baker's cross-motion for summary judgment is granted.

Settle judgment on notice.

Dated: September 24, 1974

(S.A.) K. J.
U. S. D. J.

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NOTES

- 1 "I, Malcolm Wilson, Governor of the State of New York do hereby consent to the transfer to the standby reserve of those members of the New York Army National Guard and the New York Air National Guard, otherwise qualified, who apply for such transfer, and who complete five years of satisfactory service from the date of their enlistment and who actually performed full time duty with their assigned units in the active military service of the United States pursuant to Proclamation 3972 (35 Federal Register 5001) dated March 23, 1970, and Executive Order 11519 (35 Federal Register 5003) dated March 23, 1970, issued by the President of the United States, and do hereby authorize and direct the Chief of Staff to the Governor to accept applications for such transfers and institute processes to affect transfer of qualified applicants as soon as possible, provided, however, that nothing contained herein shall be construed to authorize or permit the transfer to the standby reserve of any member of the New York Army National Guard or the New York Air National Guard who did not actually perform such full time duty with their assigned unit because of their absence from such unit for active duty for training."
- 2 "Laws applying to both Regulars and Reserves shall be administered without discrimination
(1) among Regulars; (2) among Reserves;
and (3) between Regulars and Reserves."

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(OPINION OF JUDGE WARD, KURLAND V. CALLAWAY)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
ANGELO MELA, SALVATORE V. IMBURGIO,
JOHN G. PALUMBO, MARTIN KLEINMAN,
RICHARD W. BLACK, MICHAEL GRIFFIN,
GREGORY PRESSMAN, ROBERT M. COHEN,
ARTHUR BLOOM, KENNETH LANDA, ROBERT
R. SFORZO and JAMES W. CASTLE,

74 Civ. 2153
R.J.W.

:
Plaintiffs,

-against-

HOWARD H. CALLAWAY, SECRETARY OF THE
ARMY, MALCOLM WILSON, GOVERNOR OF THE
STATE OF NEW YORK and MAJOR GENERAL
JOHN C. BAKER, COMMANDING GENERAL,
NEW YORK ARMY NATIONAL GUARD,

:
Defendants.

-----x
Plaintiffs, all of whom have completed or are
about to complete their fifth year of service in the New
York Army National Guard ("the National Guard"), a component
of the Ready Reserve forces of the United States, move for
an order pursuant to Rule 65, Fed. R. Civ. P., granting a
preliminary injunction against defendants Howard H. Callaway,
Secretary of the Army, Malcolm Wilson, Governor of the State
of New York, and John C. Baker, Commanding General of the
National Guard. They seek a transfer to the Standby Reserve
on the grounds that their continued participation in the
National Guard and the Ready Reserve is contrary to 10 U.S.C.
§269(e)(2)¹ and Army Regulation 135-91 ¶17b.² Defendants

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Wilson and Baker cross-move for an order pursuant to Rules 12(b)(1) and (6), (h)(3) and 56(b), Fed. R. Civ. P., dismissing this action or granting summary judgment as to them.

On the occasion of the postal strike in March, 1970, the President of the United States declared a state of national emergency and, pursuant to 10 U.S.C. §673, authorized and directed the Secretary of Defense to call certain reserves of the armed forces to active duty for service in the emergency. Executive Order 11519, 35 Fed. Register 5003. The call-up, denominated Operation Graphic Hand, included the units of the National Guard to which plaintiffs belong.

During Operation Graphic Hand plaintiffs did not serve with their units, as they were already performing their required active duty for training at various Army posts in the United States.

United States Army reservists who actually participated in Operation Graphic Hand or who, at that time, were on active duty for training, who otherwise qualified, have been granted transfers to the Standby Reserve upon their request. National Guardsmen who were physically present with their units have been granted this same right to transfer to the Standby Reserve by Executive Order No. 39 dated June 10, 1970,³ issued by the Governor

of the State of New York.

The Court has jurisdiction pursuant to 42 U.S.C. §1983 and 28 U.S.C. §§ 1343 and 1361 inasmuch as the plaintiffs claim a denial of their civil rights including the right to equal protection of the laws by defendants Wilson and Baker acting under color of state law and because the relief plaintiffs seek from defendant Callaway is in the nature of mandamus.

The parties are virtually agreed on the facts and on the legal issues which are presented to the Court on these motions. The first question involves the interpretation and application to plaintiffs of 10 U.S.C. §269⁴ (e) (2) and (g) and Army Regulation 135-91 ¶17b. The second question, which arises if the Court holds that the Governor's consent pursuant to 10 U.S.C. §269(g) is required in order to transfer plaintiffs to the Standby Reserve, is whether the Governor has in fact given his consent to the transfer to the Standby Reserve of those in plaintiffs' position.

Plaintiffs argue that the consent of the Governor required by §269(g) is limited to §269(f) and is wholly inapplicable to §269(e). In support of this position, plaintiffs rely primarily on their interpretation of the legislative history. However, the Court does not find plaintiffs' interpretation persuasive or dispositive of the question

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at issue, since the legislative history does not indicate what the intent of Congress was in enacting subsection (g).

The Court is of the view that both a proper construction of §269 and reasons of public policy require that plaintiffs' argument be rejected. Had Congress intended subsection (g) to apply only to subsection (f), general rules of legislative drafting would have led it to include subsection (g) as a part of subsection (f) rather than making it a separate subsection which on its face is applicable to both subsections (e) and (f).

Furthermore, since subsection (f) relates to the promulgation of regulations regarding transfer, subsection (g), if it were intended to relate only to subsection (f), would refer to the governor's approval of such regulations rather than to his consent to a particular transfer. The language in subsection (g) referring to the governor's consent to each transfer of a member of the National Guard to the Standby Reserve appears to have been chosen to cover subsection (e) as well as subsection (f) of §269.

Sound public policy reasons also require that §269 be construed to require the governor's consent under subsection (g) before the Army can transfer a member of the National Guard to the Standby Reserve under subsection (e).

The National Guard, while something of a hybrid under both state and federal control, is basically a state organization. It serves the state in time of civil emergencies within the state as well as being available for federal service during national emergencies. The protection of these state interests requires that members of the National Guard not be transferred by the Army to the Standby Reserve without the Governor's consent. Subsection 269(g) was apparently the means chosen by Congress to protect these state interests. Accordingly, the Court concludes that the consent of the Governor is required before defendant Callaway can transfer plaintiffs to the Standby Reserve.

Plaintiffs also argue that the former Governor of the State of New York, Nelson A. Rockefeller, had in fact given such consent on June 10, 1970, in his Proclamation and Executive Order No. 39. Defendants do not suggest that the consent given in 1970 was subsequently withdrawn but instead argue that it does not apply to those in plaintiffs' position, i.e., those already on active duty for training at the time their units were called up for active duty during the postal strike. 5

The Court agrees with plaintiffs' contention that the Proclamation, which recites that certain members of reserve components other than the National Guard are eligible

"by virtue of their service on active duty during the work stoppage for transfer" to the Standby Reserve and that members of the National Guard are also eligible for transfer to the Standby Reserve "by virtue of their service during the work stoppage" with the consent of the Governor, and the Executive Order give the requisite consent for the transfer to the Standby Reserve of those members of the National Guard who were serving on active duty for training when their units were called-up for active duty.

The Department of the Army, Office of the Judge Advocate General, has determined that Army Regulation AR135-300 ¶2-38; ¶2-58(2)f(5); and chapter 3 require that "[r]eservists who were on active duty for training at the time of the postal strike and whose units were ordered to active duty by the Department of the Army are to be considered as having served on active duty so as to qualify for transfer under the provisions of 10 U.S.C. §269(e)(2)." Significantly, chapter 3 of AR135-300 on which the Department of the Army relied in part in making this determination applies only to the Army National Guard.

Although the Department of the Army determination was made subsequent to the Governor's Proclamation and Executive Order, AR135-300 was effective October 1, 1969. This regulation, which appears to deem members of all reserve components on active duty for training to be on active duty to the extent that their units are on active duty, has thus been

so interpreted by an official of the Department of the Army, the agency promulgating the regulation. The Governor either knew or should have known of this provision.

Furthermore, it is clear from the Proclamation that the Governor's intent in issuing Executive Order No. 39 was to put members of the National Guard on a parity with members of other reserve components. If, in fact, the Governor did not intend that his consent extend to those in plaintiffs' position, after other reservists similarly situated were given the benefits provided in 10 U.S.C. §269 (e)(2), he could have modified the consent given in Executive Order No. 39. This he did not do.

Instead, the present Governor, through his agent, Brigadier General Francis J. Higgins, now argues that when his predecessor issued Executive Order No. 39 he did not intend that it would apply to those in plaintiffs' position. Such post hoc statements made in response to a lawsuit are not persuasive.

Turning to the propriety of issuing a preliminary injunction, the Court finds that an injunction should issue prohibiting defendants from requiring plaintiffs' further attendance at National Guard meetings or drills or at their two-week Annual Field Training. "The settled rule is that a preliminary injunction should issue only upon a clear

showing of either (1) probable success on the merits and possible irreparable injury, or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief.

Gulf & Western Industries, Inc. v. The Great Atlantic & Pacific Tea Co., 476 F.2d 687, 692-93 (2d Cir. Mar. 12, 1973); Checker Motors Corp. v. Chrysler Corp., 405 F.2d 319 (2d Cir.), cert. denied, 394 U.S. 999, 89 S. Ct. 1595, 22 L. Ed. 2d 777 (1969). " Sonesta International Hotels Corp. v. Wellington Associates, 483 F.2d 247 (2d Cir. 1973).

In the Court's view, there are at least "sufficiently serious questions going to the merits to make them a fair ground for litigation" since absent an additional showing by defendants, plaintiffs will prevail. Furthermore, the balance of hardships is tipped decidedly in favor of plaintiffs. Unless an injunction is granted, plaintiffs who are in or about to enter their sixth year of service in the National Guard will be required to attend drills and meetings and an annual two-week training session. Their attendance at these drills and training sessions will cause a disruption to their lives which could not be remedied should plaintiffs prevail. Defendants have not demonstrated that they will suffer any overriding injury. Nor will the issuance of a preliminary injunction interfere with the Governor's exercise of dis-

NOTES

- 1 "Except in time of war or of national emergency declared by Congress, a Reserve who is not on active duty, or who is on active duty for training, shall, upon his request, be transferred to the Standby Reserve for the rest of his term of service, if --

* * * *

(2) he served on active duty (other than for training) in the armed forces for an aggregate of less than five years, but satisfactorily participated, as determined by the Secretary concerned, in an accredited training program in the Ready Reserve for a period which, when added to his period of active duty (other than for training), totals at least five years * * *."

- 2 *** Except for those who are discharged due to expiration of term of military service or other authorized reasons, upon completion of active duty, members will be transferred as follows:

* * * *

b. Those who have completed a total of five but less than 6 years' Ready Reserve and active Federal service will be transferred to the Standby Reserve."

- 3 "I, Nelson A. Rockefeller, by virtue of authority vested in me as Governor by the Constitution and the laws of the State of New York including Section 3 of the Military Law and by the laws of the United States including Title 10 United States Code, Section 269(g), do hereby consent to the transfer to the Standby Reserve of those members of the New York Army National Guard and New York Air National Guard, otherwise qualified, who apply for such transfer, and who complete five years of satisfactory service from the date of their enlistment and who performed full time duty in the active military service of the United States pursuant to Proclamation 3972 (35 Federal Register 5001) dated March 23, 1970, and Executive Order 11519 (35 Federal Register 5003) dated March 23, 1970, issued

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by the President of the United States, and do hereby authorize and direct the Chief of Staff to the Governor to accept applications for such transfers and institute appropriate processes to effect transfer of qualified applicants as soon as possible."

4 "A member of the Army National Guard of the United States or the Air National Guard of the United States may be transferred to the Standby Reserve only with the consent of the governor or other appropriate authority of the State or Territory, Puerto Rico, the Canal Zone, or the District of Columbia, whichever is concerned."

5 "WHEREAS, the Governor is Commander in Chief of the Militia of the State pursuant to the Constitution of the State as restated in Section three of the Military Law; and

WHEREAS, the President of the United States by Proclamation 3972 (35 Federal Register 5001) dated March 23, 1970, declared a state of national emergency in connection with a work stoppage by certain employees in the Postal Service and by Executive Order 11519 (35 Federal Register 5003) dated March 23, 1970, authorized and directed the Secretary of Defense to order and call into the active military service of the United States such of the reserve components of the armed forces as were necessary to assist the Postmaster General to restore and maintain postal service, and to execute the Postal laws of the United States including members and units of the New York Army and Air National Guard; and

WHEREAS, members of the New York Army National Guard and New York Air National Guard and members of other reserve components of the Armed Forces of the United States were called and ordered into the active military service of the United States pursuant to the order of the President and in accordance with the provisions of Title 10 United States Code, Sections 673, 3500 and 8500 and, as a result, certain of these members did serve in the active military service of the United States as directed; and

WHEREAS, certain members of reserve components, other than the National Guard are eligible, upon individual application, by virtue of their service on active duty during the work stoppage, for transfer pursuant to

Title 10, United States Code, Section 269(e)(2) to the Standby Reserve from the Ready Reserve after completing five (5) years of satisfactory service from the date of their enlistment; and

WHEREAS, certain members of the New York Army National Guard and New York Air National Guard are eligible, upon individual application, by virtue of their service during the work stoppage for transfer pursuant to Title 10 United States Code, Section 269(e)(2) to the Standby Reserve from the Ready Reserve after completing five (5) years of satisfactory service from the date of their enlistment, with the consent of the Governor.

NOW, THEREFORE, I, Nelson A. Rockefeller, by virtue of the authority vested in me by the Constitution and laws of the State of New York, including Section three of the Military Law, and Title 10, United States Code, Section 269(g), have this day by Executive Order consented to the transfer to the Standby Reserve of those members of the New York Army and Air National Guard, otherwise qualified, who have performed active duty during the work stoppage, complete five (5) years of satisfactory service since enlistment and make application for transfer, and have ordered the Chief of Staff to the Governor to accept applications for such transfers and institute appropriate processes to effect transfer of qualified applicants as soon as possible."

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(OPINION OF JUDGE WARD, MELA V. CALLAWAY)

APPENDIX * PAGE TWO

LIST OF PLAINTIFFS

NAME

UNIT

DATE COMPLAINT FILED

LIST OF PLAINTIFFS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ARTHUR S. KURLAN, et al., X/

Plaintiffs,

Civ. No.

-against-

COMPLAINT

HOWARD H. CALLAWAY, SECRETARY OF THE
ARMY, MALCOLM WILSON, GOVERNOR OF
THE STATE OF NEW YORK and MAJOR GENERAL
JOHN C. BAKER, COMMANDING GENERAL, NEW
YORK ARMY NATIONAL GUARD,

Defendants.

Plaintiffs, by their attorneys, Kunstler Kunstler Hyman & Goldberg, allege for their complaint as follows:

Parties:

1. All plaintiffs listed above are members of units of the New York Army National Guard of the United States and are otherwise members of the United States Army Ready Reserve, pursuant to Title 10 U.S.C. §261 et seq. At least one of said plaintiffs resides within the jurisdiction of the Southern District of New York.

2. Specifically, plaintiffs, and each of them, are members of certain units of the New York Army National Guard, as set forth on Appendix A to the complaint.

3. Defendant HOWARD H. CALLAWAY is sued herein in his official capacity as Secretary of the Army of the United States, with offices in Washington, D.C., and is that person under whose ultimate command plaintiffs lie. He is the official who has the ultimate authority under Title 10 U.S.C. §269(e) to transfer plaintiffs to the Standby Reserve of the United States Army.

4. Defendant MALCOLM WILSON is sued herein in his official capacity as Governor of the State of New York and Commander-in-Chief of the New York Army National Guard of the United States.

X/ A complete list of plaintiffs is set forth in Appendix A to the complaint.

(COMPLAINT)

5. Defendant MAJOR GENERAL JOHN C. BAKER is sued herein in his official capacity as the Commanding General of the New York Army National Guard of the United States.

Jurisdiction

6. Jurisdiction of this Court arises under Title 28 U.S.C. §§1331, 1343, 1361, 1391, 2201, and Title 42, U.S.C. §1983 and the Fifth and Fourteenth Amendments to the Constitution of the United States.

7. The amount in controversy exclusive of interest and costs is in excess of \$10,000.00.

8. The issue in controversy under which this claim arises is a federal question involving interpretation and implementation of the laws of the United States and administrative regulations enacted thereunder.

Cause of Action

9. Each of the plaintiffs above named is a member of the New York Army National Guard of the United States and the United States Army Ready Reserve, having enlisted in the Armed Forces as an obligated reservist pursuant to Title 10, U.S.C. §§510, 651 and 3261. All plaintiffs are fulfilling their obligation satisfactorily, having attended the necessary drills and having completed active duty for training and other requirements imposed by laws of the United States and the rules and regulations of the United States Army.

10. Annexed hereto and made a part of the complaint is Appendix A which sets forth the names of said plaintiffs, the units they are assigned to and the date on which each of them has or will complete his fifth year of service and thereby be eligible for transfer to the Standby Reserve, pursuant to Title 10 U.S.C. §269(e).

11. That the issues presented in this action are identical to those presented in Mela v. Callaway, filed in the Southern District of New York, Docket No. 74 Civ. 2153, assigned to the Hon. Robert J. Ward, United States District Court.

12. On or about March 23, 1970, the President of the United States declared a national emergency in connection with a work stoppage by certain employees of the postal service, and by Executive Order No. 11519 authorized and directed the Secretary of the Department of Defense to order and call to active duty certain units of the United States Ready Reserve as were necessary to assist the Postmaster General, pursuant to Title 10 U.S.C. §673. Included in this Executive Order was specific direction to call up units of the National Guard.

13. This call-up to active duty by the President was officially designated Operation Graphic Hand.

14. In conformity with said directive, the Commanding General of the Continental Army Command authorized the Commanding General of the 77th United States Army Reserve Command to call to active duty designated units of the Reserve components of the Ready Reserve in the New York Metropolitan area.

15. Among those units called to active duty under authority of the President were units of the United States Army Reserve and the New York Army National Guard, including those units to which plaintiffs were assigned at the time of the call-up.

16. As a result of said call to Active Duty, each of plaintiffs' units was federalized for the period of Operation Graphic Hand beginning March 24, 1970 and continuing thereafter under the direct control and authority of the President of the United States and his designated agents, pursuant to Title 10 U.S.C. §673.

17. Each unit was, for the period March 24, 1970 until his unit was returned to Ready Reserve status, considered a part of the Active Army of the United States pursuant to Title 10 U.S.C. §3497 and Title 32 U.S.C. §303.

18. As a result of plaintiffs' units being federalized and called to active duty, all determinations with regard to the active duty status of the members of said units was solely and exclusively within the control and responsibility of the President of the United States and his designated agents, including the Secretary of the Army, pursuant to Title 10 U.S.C. §673, the Executive Order of the President of the United States, dated March 23, 1970 and Army Regulation 135-300.

19. On March 24, 1970 and for the period that his unit was on active duty in Operation Graphic Hand, each plaintiff named herein was on Active Duty for Training (hereinafter referred to as ACDUTRA) with the United States Army assigned to diverse Army installations in the Continental United States.

20. Pursuant to AR 135-300, 112-38 and 2-58 (2)(F), and 113-1 et seq., an individual who is a member of a Reserve or National Guard unit called to Active Duty while he is serving on ACDUTRA shall be considered on active duty with his home unit for all purposes although he shall continue at his ACDUTRA assignment until otherwise ordered.

21. The defendant SECRETARY OF THE ARMY has, by his agents, determined that the terms of AR 135-300 so apply and that individuals whose units were called to active duty while they were on ACDUTRA:

"... are to be considered as having served on active duty ... [and] ... considered just as if [they] had reported to [their] USAR Reserve Center on the morning of 24 March, 1970, and remained there until [their] unit was dismissed."

See letter of Colonel William Carne, Chief, Litigation Division, Department of the Army, Office of the Judge Advocate General, annexed hereto as Exhibit A.

22. The determination by the Secretary of the Army and his authorized agents that individuals in plaintiff's cir-

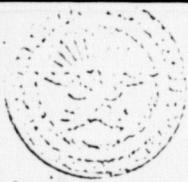
cumstance were in fact deemed to be on active duty with the United States Army in Operation Graphic Hand is binding upon the New York Army National Guard as to those members and units federalized during the Operation and thereby under the exclusive control of the United States Army pursuant to Title 10 U.S.C. §3497 and Title 32 U.S.C. §325.

23. Pursuant to the determination of the Secretary of the Army, AR 135-300, applicable statutes and Mela v. Callaway, (opinion filed, Ward, J. 6/5/74, 74 Civ. 2153), plaintiffs, while they were on ACDUTRA for the period of March 14, 1970 and thereafter, were considered federalized and on active duty in Operation Graphic Hand just as if they had reported to their units which were federalized and called to active duty in New York.

24. Pursuant to Title 10 U.S.C. §269(e), Army Regulation 135-91 §17(b) and the case of Hornstein v. Laird, 327 F. Supp. 993, (S.D. N.Y. 1971), all members of the Ready Reserve who are called to active duty shall, upon their request, be transferred to the Standby Reserve upon completion of five years' duty in the Ready Reserve.

25. In fact, all members of the United States Army Reserve who served on active duty during Operation Graphic Hand, including members of the Reserve who were on ACDUTRA when their units were called up in Operation Graphic Hand, have, in fact, been transferred to the Standby Reserve upon their request after five years' service in the Ready Reserve.

26. Members of the New York Army National Guard who were federalized during Operation Graphic Hand have likewise been transferred to the Standby Reserve after five years of service except for plaintiffs and others in a similar circumstance not named in this action. Certain other persons in the same circumstances, namely, plaintiffs in the case of Mela, et al., v. Callaway, have obtained a preliminary injunction enjoining defendants from ordering them to further meetings and/or summer camp, pending a trial on the merits. (Memorandum Opinion filed June 5, 1974, Docket No. 74 Civ. 2153, U.S.D.C., S.D. N.Y.).



27. On June 10, 1970, the Governor of the State of New York, Nelson Rockefeller, issued an Executive Order mandating that members of the New York Army National Guard who served on active duty in Operation Graphic Hand be permitted, upon their request, to be transferred to the Standby Reserve after five years' satisfactory service. This Executive Order remains in full force and effect. A copy of said Executive Order is annexed hereto as Exhibit B.

28. On June 10, 1970, the appropriate agents of the New York National Guard directed that individuals who performed active duty be transferred to the Standby Reserve upon their request after five years' satisfactory service and that they be excused from Annual Field Training (summer camp) after submitting their request. This directive remains in full force and effect. A copy of said directive is annexed hereto as Exhibit C.

29. Plaintiffs, individually and by their attorney, have duly requested transfer to the Standby Reserve on the grounds that pursuant to Title 10 U.S.C. §269(e) they served on active duty during Operation Graphic Hand as determined by the Secretary of the Army, and otherwise qualify for transfer to the Standby Reserve upon completion of five years' service in the New York Army National Guard of the United States.

30. That notwithstanding plaintiffs' qualification and request for transfer to the Standby Reserve, defendants have refused and neglected to so transfer them and have otherwise indicated to plaintiffs or their agents that they will not transfer plaintiffs as they complete their fifth year of service in the New York Army National Guard.

31. Pursuant to Title 10 U.S.C. §269(e), AR 135-91 ¶17(b) and pursuant to the consent of the Governor, as indicated by Executive Order and Proclamation, plaintiffs have been or will be eligible, upon completing five years of service in the Ready

Reserve, for transfer to the Standby Reserve upon their request, on the grounds that they have served on active duty during Operation Graphic Hand.

32. Even without the Executive Order of the Governor, plaintiffs qualify for transfer to the Standby Reserve under the mandatory terms of Title 10 U.S.C. §269(e) and AR 135-91, §17(b), which terms are not subject to the consent of the Governor.

33. Plaintiffs, as members of a National Guard of the United States, are also members of the Ready Reserve of the United States under Title 10 U.S.C. §§268 and 269(b) and 32 C.F.R. §564.14(e), and are thereby subject to the rights and obligations applicable to such persons, whether Guardsmen or Reservists, as defined by Congress and the President of the United States. The ultimate determination as to the status of such Guardsmen in the Ready Reserve is subject to the authority and control of the Secretary of Defense and his agent, the SECRETARY OF THE ARMY, pursuant to Title 10 U.S.C. §264 and Title 32 U.S.C. §§302, 502.

34. The New York Army National Guard, under its Commander-in-Chief, the Governor of the State of New York, is a component of the Ready Reserve under Title 10 U.S.C. §269(b) and Title 32 U.S.C. §104(b) and is subject to the rights and obligations set forth by Congress and the President of the United States, and thereby subject to the rules and regulations enacted by the SECRETARY OF THE ARMY.

35. The Standby Army Reserve is a part of the Reserve organization enacted by Congress pursuant to Title 10 U.S.C. §273 and under the direct control and authority of the SECRETARY OF THE ARMY. No person may be transferred to the Standby Reserve of the United States Army without the approval and consent of the SECRETARY OF THE ARMY.

36. Pursuant to Title 10 U.S.C. §3497, a National Guard unit, once federalized and called to active duty, is the same as a unit of the Army Reserve and thereby subject to the same rules and regulations.

37. That under appropriate rules and regulations it has been finally determined without limitation that persons in the Army Reserve having been on Active Duty for Training (ACDUTRA) when their units were federalized in Operation Graphic Hand were deemed to be on active duty for all purposes as if they were present with their home unit.

38. This determination applies with the same force and validity to plaintiffs, without distinction or reservation, and they therefore were, at the time of Operation Graphic Hand, deemed to have been on active duty with their federalized units for all purposes as if they were present with their home unit, pursuant to AR 135-300, Chapters 2 and 3.

39. Plaintiffs thereby qualify in every respect for transfer to the Standby Reserve under Title 10 U.S.C. §269(e), AR 135-91 §17(b) and the Executive Order of the Governor of the State of New York.

40. That the refusal of defendants to transfer plaintiffs to the Standby Reserve as they qualify is arbitrary and capricious and in direct contravention of the clear mandate of Congress as set forth in Title 10 U.S.C. §269(e) in mandatory terms, and the Rules and Regulations validly promulgated by the SECRETARY OF THE ARMY (AR135-91 §17(b)).

41. That the refusal of defendants to transfer plaintiffs to the Standby Reserve as they qualify is a denial of plaintiffs' rights to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States.

42. That the refusal of defendants to transfer plaintiffs to the Standby Reserve as they qualify is a denial of plaintiffs' right to equal protection of the law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

DIVISION OF MILITARY AND NAVAL AFFAIRS

43. That the refusal of defendants, and specifically the Governor of the State of New York and the Commanding General of the New York Army National Guard, to transfer plaintiffs to the Standby Reserve as they qualify is a denial of plaintiffs' civil rights under color of state law, as guaranteed by Title 42 U.S.C. §1983.

44. Transfer to the Standby Reserve is applicable on the same terms to all members of the Ready Reserve who qualify and there is no rational reason or basis for distinction between Reservists and Guardsmen as related to status in the Ready or Standby Reserve.

45. Transfer to the Standby Reserve under Title 10 U.S.C. §269(e)(2) is intended to be a right accorded all Ready Reservists who have served on active duty so that after five years' service they will be placed in a less vulnerable position for future calls to active duty.

46. The distinction between Ready Reserve as defined by Title 10 U.S.C. §269 and the Standby Reserve as defined by Title 10 U.S.C. §273 is significant in that Standby Reservists are relieved of further active reserve training under Title 10 U.S.C. §273 and may not be called to active duty except under extreme circumstances defined by Congress in Title 10 U.S.C. §674.

47. Certain plaintiffs, as set forth in Appendix A to the complaint, immediately qualify for transfer to the Standby Reserve and will suffer irreparable harm unless defendants are enjoined from requiring them to attend annual training for two weeks' summer camp and continued weekly or monthly drills as members of the Ready Reserve. They will otherwise continue to be subject to call-up to active duty as members of the Ready Reserve, pursuant to Title 10 U.S.C. §673 and 673a.

48. As each plaintiff completes his fifth year of service, as set forth in Appendix A annexed hereto, he will suffer irreparable harm and will be required to remain in the Ready Reserve, as above set forth, in derogation of his rights, unless a preliminary injunction is granted.

49. Each plaintiff to this action is in the same, identical position as all other plaintiffs to the action with regard to whether he qualifies for transfer to the Standby Reserve as a result of his active duty service in March, 1970.

50. Plaintiffs are joined in one action in that each seeks identical relief from facts arising out of the same transaction or occurrence and there is a question of law common to all plaintiffs against the same defendant.

51. That plaintiffs have no adequate remedy at law.

52. That the injury caused or to be caused plaintiffs is and will be irreparable and immediate and cannot be compensated by the payment of money damages.

53. Plaintiffs have exhausted all administrative remedies available to them.

Relief Requested

Plaintiffs, as a result of the foregoing, request judgment against defendants as follows:

(a) That a declaratory judgment issue on behalf of each and every one of the plaintiffs against defendants, adjudging and declaring that plaintiffs individually shall be deemed qualified for transfer to the Standby Reserve, pursuant to Title 10 U.S.C. §269e, as a result of their active duty service during Operation Graphic Hand in March 1970, upon their completing five years of satisfactory service in the New York Army National Guard of the United States.

(b) A writ of mandamus issue against the defendant SECRETARY OF THE ARMY under Title 28 U.S.C. §1361 directing and ordering that plaintiffs be transferred to the Standby Reserve upon completion of their fifth year of satisfactory service in the New York Army National Guard of the United States.

(c) A permanent injunction issue against each of the defendants, his agents, servants and employees, directing and ordering defendants, their agents, servants and employees

to transfer the plaintiffs, upon completion of their fifth year of service in the New York Army National Guard of the United States, to the Standby Reserve of the United States Army, pursuant to Title 10 U.S.C. §269(e)(2).

(d) That pending a trial on the merits herein, plaintiffs request a preliminary injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure, ordering that defendants, their agents, servants and employees, be enjoined from requiring each plaintiff, as he satisfactorily completes his fifth year of service in the New York Army National Guard as set forth in Appendix A, to attend New York Army National Guard unit training assemblies and annual training during the pendency of this action and until the entry of final judgment, on the ground that:

(i) plaintiffs will suffer irreparable harm unless a preliminary injunction is granted in that each plaintiff, as he completes his fifth year of service, will be required to attend further meetings and annual training notwithstanding that he is entitled to be relieved of such obligation and transferred to the Standby Reserve;

(ii) such preliminary injunction will not unduly prejudice defendants;

(iii) Plaintiffs have every likelihood of success on the merits, pursuant to Mela v. Callaway, supra, and Hornstein v. Laird, 327 F. Supp. 993, (S.D. N.Y. 1971).

(e) Such other and further relief as this Court may deem just and proper in the premises.

WHEREFORE, plaintiffs demand judgment against the defendants as above set forth, together with the costs and disbursements of this action.

KUNSTLER KUNSTLER HYMAN & GOLDBERG
Attorneys for Plaintiffs
370 Lexington Avenue
New York, New York 10017

By _____
Steven J. Hyman

LIST OF PLAINTIFFS

APPENDIX A

LIST OF PLAINTIFFS

<u>NAME</u>	<u>UNIT</u>	<u>DATE COMPLETE FIFTH YEAR</u>
Kurlan, Arthur S. Wassmer, Robert H.M.	42 Inf.Div.Arty. 101st Sig. Batt.	June 18, 1974 June 27, 1974
Catalano, Michael Defalco, Anthony Kleva, Gregory A. Jr. Reilly, Francis Wm. Apittel, Steven	101st Cav. 101st Cav. 145th Main. 258th Artly. 101st. Cav.	July 19, 1974 July 19, 1974 July 24, 1974 July 30, 1974 July 31, 1974
Loscalzo Anthony Snow, Richard A. Krupp, Gary Lewis Forget, John J.Jr. Bellows, Steven Koop, William T. Cacciatore, Andrew Boyle, John F. Krapf, Francis G. Szerencsy, Jay P. Cottone, Ronald Peltz, Stephen Trainor, Michael J. Bacharach, Leonard Van Grover, Jeff Ehrlich, Terry Horgan, William P. Ostar, Lewis M. Passman, Martin	104 Fld.Arty. 101st. Cav. 106th Inf. HHD 42nd Bn. 102nd Med. 258th Artly. 101st Sig. Bn. 106th Inf. HHC 69th Inf. 106th Inf. 106th Inf. 42nd Bn. S&T 101st Sign.Bn. 107th Inf. 107th Inf. 107th Inf. 258th F.A.Bn. 106th Bn. 242nd. Sig. Bn.	August 13, 1974 August 9, 1974 August 14, 1974 August 14, 1974 August 14, 1974 August 18, 1974 August 19, 1974 August 19, 1974 August 19, 1974 August 21, 1974 August 21, 1974 August 25, 1974 August 25, 1974 August 25, 1974 August 26, 1974 August 26, 1974 August 27, 1974 August 27, 1974 August 28, 1974 August 28, 1974
Koller, Matthew, J. Jr. Orlando, Andrew Newman, Paul S. Katz, Richard Fitzgibbons, John Marx, Larry Halter, Anthony Raab, George	101st Sig. 71st Inf. 42nd. Main. Bn. 3rd. Bn. Medic 106th Inf. 258th. Bn. Trng. Bn.A.6 HHC 42nd. Bn.	September 1, 1974 September 2, 1974 September 3, 1974 September 3, 1974 September 3, 1974 September 4, 1974 September 5, 1974 September 7, 1974

LIST OF PLAINTIFFS

<u>NAME</u>	<u>UNIT</u>	<u>DATE COMPLETE FIFTH YEAR</u>
Bekoff, Barry	42nd Bn.	September 8, 1974
Ryan, William James	69th Inf.	" 9, "
Keshinover, Michael	69th Inf.	" 9, "
Rosen, Mark B.	69th Inf.	" 9, "
Cain, John F.	69th Inf.	" 9, "
Balsamo, Philip	106th Inf.	" 10, "
Rudich, Steven Irwin	106th Inf.	" 10, "
Pittelli, Ronald F.	145th Main.	" 10, "
Boshnack, Jeffrey W.	2nd. Bn.	" 11, "
Quinn, William Jos. Jr.	258th Arty.	" 11, "
Maggio, Robert	69th Inf.	" 18, "
Longo, William C.	101st Sign.	" 18, "
Bremen, Michael	101st Sign.	" 18, "
Dattner, John W.	106th Inf.	" 18, "
Fisher, Stuart I.	71st Inf.	" 18, "
Gaffney, Robert E.	69th Inf.	" 18, "
O'Hare, Peter G. Jr.	69th Inf.	" 19, "
O'Connor, Joseph F.	258th Arty.	" 20, "
Esrig, Joseph S.	258th Arty.	" 21, "
Bickel, Robert	106th Bn.	" 22, "
Ferrara, Daniel A.	69th Inf.	" 23, "
Fischer, Frederick S.	69th Inv.	" 23, "
Sferrazzo, Anthony J.	69th Reg.	" 24, "
Rutkowski, Thomas J.	258th Adty.	" 25th "
Anderson, Kenneth R.	258th Arty.	" 25, "
Hannigan, John K.	42nd Supply	" 25, "
Ziminski, Kenneth R.	242nd Sig.	" 25, "
Ehring, Edward L.	258th F.A.	" 28, "
Loggia, Vincent	106th Inf.	" 29, "
Lomangino, Joseph	106th Inf.	" 29, "
Lane, Norman	145th Main.	" "
Davis, Robert A.	71st. Inf.	October 2,
McGevna, Kenneth	258th Arty.	" 2,
Waller, Robert J.	101st Sign.	" 2,
Goldenberg, Robert A.	71st Inf.	" 2,
Beckerman, Stanley P.	71st Inf.	" 6,
Genco, Frank G.	102nd Eng.	" 6,
Green, Frank S.	71st Inf.	" 6,

LIST OF PLAINTIFFS

<u>NAME</u>	<u>UNIT</u>	<u>DATE COMPLETE FIFTH YEAR</u>
Gittleman, Charles S.	71st Inf.	October 6, 1974
Koller, Frank J.	102nd Bn.	" 6, "
Cahill, John F.	106th Inf.	" 6, "
Sorkin, Elliot H.	69th Inf.	" 7, "
Hamecs, Robert T.	71st Inf.	" 8, "
Goodwin, James E.	71st Inf.	" 9, "
Goodman, Carl Alan	71st Inf.	" 9, "
Ury, Douglas A.	71st Inf.	" 9, "
Gisonna, Gary L.	101st Cav.	" 12, "
Ivaldi, Ernest Jr.	106th Inf.	" 12, "
Liptscher, Larry	101st Sign.	" 13, "
Bisso, Louis A.	101st Cav.	" 13, "
Rosenberg, Marvin	107th Inf.	" 13, "
Denihan, Dennis	107th Inf.	" 14, "
Pistilli, John B.	69th Inf.	" 14, "
Hoover, Robert P.	69th Inf.	" 14, "
Schneider, Jan G.	107th Inf.	" 15, "
Perlman, Joel A.	42nd Main.	" 15, "
Patterson, Ronald	69th Inf.	" 16, "
Wishney, Wayne Alan	107th Inf.	" 17, "
Hannam, Richard J.	69th Reg.	" 21, "
Cassano, Caesar	258th Arty.	" 22, "
Policella, Vincent	258th Arty.	" 23, "
Nobile, Charles B.	71st Inf.	" 23, "
Janniello, Richard C.	258th Arty.	" 23, "
Lubarsky, Paul	42nd S & T	" 27, "
Collica, Edward G.	42nd S & T	" 27, "
Breitinger, Frederick R.	42nd HHC	" 29, "
Denihan, Daniel J.	107th Inf.	" 22, "
Marburger, John M.	42nd Main.	" 21, "

Carsons, David Wayne	145th Lt. Maint.	November 1, 1974
Johnsen, Robert K.	107th Inf.	" 1, "
Giua, Benjamin Jr.	242nd Sign.	" 3, "
Graffigna, Paul A.	101st Cav.	" 4, "
Sorgie, Frank A.	258th Arty.	" 5, "
Genna, Andrew	69th Reg.	" 5, "
Femina, Frank		
Dellafemina, Frank	71st Inf.	" 5, "
Kaiser, Kenneth Sturart	42nd S & T	" 5, "

LIST OF PLAINTIFFS

<u>NAME</u>	<u>UNIT</u>	<u>date COMPLETE FIFTH YEAR</u>
Greese, Henry W.	69th Inf.	November 6, 1974
Schlossman, Gary	42nd Main.	" 6, "
Koenig, John B.	42nd HHC	" 7, "
Nadler, Fred	42nd S & T	" 11, "
Lewis, Melvyn	107th Inf.	" 11, "
Lazzard, Michael E.	71st Inf.	" 12, "
Kann, Peter E.	71st Inf.	" 12, "
Petrucci, John J.	71st Inf.	" 12, "
Burns, Mark	71st Inf.	" 13, "
McGuiness, James	71st Inf.	" 13, "
Zarella, Robert E.	145th Maint.	" 13, "
Lerman, Carlos A.	42nd S & T	" 13, "
Rice, Donald C.	69th Inf.	" 14, "
Tomaroff, Jay	102nd Eng.	" 14, "
Neier, Solomon J.	102nd Eng.	" 14, "
Giummio, Joseph F.	69th Inf.	" 15, "
Ahlers, Robert E.	101st Cav.	" 15, "
Cygler, Irving	102nd Eng.	" 15, "
Amoia, Joseph	69th Inf.	" 15, "
Cutugno, Charles	69th Inf.	" 15, "
Cardillo, James V.	69th Inf.	" 15, "
Weisberg, Nelson	42nd S & T	" 15, "
Borg, Joseph K.	69th Inf.	" 15, "
Hanichka, John	102nd Eng.	" 15, "
Rivera, Michael G.	102nd Eng.	" 15, "
Weisselberg, Allen	42nd S & T	" 17, "
Rosina, Salvatore	69th Inf.	" 18, "
Eisenhart, Gary N.	42nd S & T	" 19, "
Embry, Talton R.	107th Inf.	" 20, "
Scharf, Bernard M.	42nd Adj. Co.	" 23, "
Toback, Norman P.	106th Inf.	" 24, "
Rattiner, Bernard	42nd S & T	" 25, "
Romeo, Carl L.	42nd S & T	" 25, "
Schechter, Lawrence I.	42nd S & T	" 25, "
Catalano, James V.	242nd Sign. Bn.	" 26, "
McConney, Kenneth	69th Inf.	" "

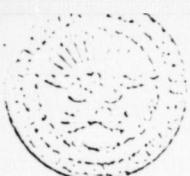
LIST OF PLAINTIFFS

<u>NAME</u>	<u>UNIT</u>	<u>DATE COMPLETE FIFTH YEAR</u>
Carney, Joseph T.	71st Inf.	December 1, 1974
Weiner, Mark A.	258th Arty.	" 1974
Mondell, George A.	242nd Sign. Bn.	" 1974
Dell Olio, Louis	69th Inf.	" 2, "
Fischbein, Allen D.	69th Inf.	" 2, "
Van Cleef, Gregory M.	71st Inf.	" 2, "
Cashman, Richard	71st Inf.	" 2, "
Slater, Richard	42nd S & T	" 4, "
Wetzel, Richard O.	242nd Sign.	" 7, "
McLaughlin, Ian S.	242nd Sign.	" 9, "
Skop, Ronald	258th Arty.	" 10, "
Jordan, Salvatore V.Jr.	71st Inf.	" 11, "
Tanzer, Paul	71st Inf.	" 11, "
Blatt, Andrew R.	71st Inf.	" 11, "
Salvo, Vincent	71st Inf.	" 11, "
Dercher, David J.	71st Inf.	" 11, "
Marzinke, Matthew	107th Inf.	" 11, "
Alexander, Frederick C.	71st Inf.	" 11, "
Bembenista, Walter J.	71st Inf.	" 11, "
Klinger, Neal	587th Trans.	" 13, "
Cirincione, Richard	258th Arty.	" 17, "
Greenberg, Harvey J.	69th Inf.	" 18, "
Rosen, Michael E.	69th Inf.	" 18, "
Lonergan, George	258th Arty.	" 23, "
Marangos, John Z.	258th Arty.	" 23, "
Olitsky, Steven M.	107th Inf.	" 29, "
Harris, Stewart	107th Inf.	" 30, "
Greenberg, Lawrence S.	107th Inf.	" 30, "
Langone Thomas	106th Inf.	" 10, "

LIST OF PLAINTIFFS

<u>NAME</u>	<u>UNIT</u>	<u>DATE COMPLETE FIFTH YEAR</u>
Miller, James	71st Inf.	January 8, 1975
Fischer, Ross J.	71st Inf.	" 8, "
Addesso, Angelo R.	258th Arty.	" 12, "
Cavaluzzi, Paul J.	258th Arty.	" 12, "
Kraus, Joseph M.	258th Arty.	" 13, "
Brokowsky, Howard J.	258th Arty.	" 13, "
Weiss, Kenneth J.	107th Inf.	" 13, "
Hogan, Stephen	258th Arty.	" 13, "
Cowan, Thomas M.	258th Arty.	" 13, "
Fuhrman, Robert	258th Arty.	" 13, "
Sottile, Peter A.	71st Inf.	" 15, "
Graci, Lawrence R.	71st Inf.	" 15, "
Rosenblum, Harold	71st Inf.	" 15, "
Gittelman, David M.	106th Inf.	" 15, "
Gillette, Bryan R.	71st Inf.	" 15, "
Jackson, Robert M.	71st Inf.	" 15, "
Bass, Bienvenido B.	71st Inf.	" 15, "
Weissman, Alan	71st Inf.	" 15, "
Eisenberg, Carl P.	42nd S & T	" 20, "
Puleo, Thomas R.	106th Inf.	" 23, "
Walsh, William E.	107th Inf.	" 26, "
Weiss, Louis	107th Inf.	" 28, "
Caruso, Ronald	107th Inf.	" 28, "
Paine, Jay	107th Inf.	" 28, "
Manjorin, Gregg J.	69th Inf.	" 29, "

Mackay, Donald	71st Inf.	February 2, 1975
Terraciano, Thomas L.	71st Inf.	" 2, "
Cantor, Martin R.	71st Inf.	" 2, "
Blaiotta, Jerry	71st Inf.	" 2, "
Tancredi, Frank L.	71st Inf.	" 3, "
Corn, Edward S.	42nd Inf.	" 3, "
Cicalese, Salvatore D.	69th Inf.	" 4, "



DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, D.C. 20310

ATTENTION: DAJA-LTP.

21 AUG 1973

SUBJECT: "Graphic Hand" Litigation [Hornstein v. Laird, 327 F. Supp. 993 (U.S.D.C., D.N.Y., 1971)]

Colonel Vernon M. Culpepper
Army Staff Judge Advocate
Hq, First United States Army
Fort Meade, MD 20755..

1. On 23 June 1973 the Litigation Division, Office of The Judge Advocate General, received from your office a letter, subject: "Graphic Hand" Litigation. Inclosures to your letter were letters from Steven J. Hyman, Attorney at Law, dated April 13, 1973, April 27, 1973, and June 21, 1973, concerning thirteen named reservists whom he represented. In his letters, Mr. Hyman claimed that these reservists were entitled to transfer to the Standby Reserve upon completion of their fifth year of Ready Reserve duty. Mr. Hyman premised his claim upon the holding in Hornstein v. Laird, 327 F. Supp. 993 (S.D.N.Y., 1971). (Incl 1).
2. As you know, the Hornstein decision arose out of the postal strike which occurred in March 1970. On 23 March 1970 President Nixon by Presidential Proclamation declared a state of National emergency and directed the Secretary of Defense to take necessary action pursuant to 10 U.S.C. §673 in order that the "laws of the United States pertaining to the Post Office Department may be executed in accordance with their terms." 3 C.F.R. 1966-1970 Comp., pp. 473-74. The Secretary of Defense designated the Secretary of the Army as the Executive Agent for the Department of Defense in all matters pertaining to the rendering of assistance to the Post Office Department. Pursuant to this authority, the Department of the Army by electrical message directed the appropriate CONUS commanders to order to active duty at home stations certain designated units of the ARNGUS and the United States Army Reserve (DA Message 240259Z Mar 70). Units to be ordered to active duty were listed in paragraph 2 of that message. Since the DA Message would not reach the various Army commanders to whom it was dispatched until early in the morning of 24 March, General Rich, the Deputy Commanding General, CONARC, informed General Kaine, Commander of the 77 Army Reserve Command, by telephone on the evening of 23 March 1970, that the New York Units of the 77th were to be activated the next day for the postal strike. General Kaine inquired as to what specific units were to be activated

Enc 3

Exhibit A

DAJA-LTP

and was told that there were two pages of units in small type, but for all intents and purposes the list covered all units of the 77th in the Metropolitan area except the 4th JAG Detachment. The following message was broadcast by New York radio and television stations at the request of the 77th ARCOM:

All US Army Reserve Personnel assigned to New York City Units of the 77th US Army Reserve Command, except the 4th JAG Detachment, are directed to report to their respective USAR centers in fatigue uniform at 0645 hours tomorrow, 24 Mar 1970.

At approximately 0300, 24 March, General Kaine received a telephone call from an officer at Fort Dix and had the list of units activated read to him. At a commanders conference at 0645, 24 March, General Kaine directed the commanders of those units not on the list to dismiss their troops immediately as they were not to be activated. Units not ordered to active duty by the DA Message were thereafter dismissed on the morning of 24 March. In Hornstein v. Laird, *supra*, the plaintiffs were reservists who had reported on the 24th as ordered and who had then been dismissed because their units were not listed on the DA Message. The court held that both General Rich and General Kaine were competent authority to order the units and their members to active duty and that the plaintiffs entered upon active duty when they reported to their respective USAR centers in uniform at the time specified. Consequently the plaintiffs were entitled to be transferred to the Standby Reserve in accordance with 10 U.S.C. 269(e)(4) [The Court cites 269(e)(4); but the applicable provision is 269(e)(2); 269(e)(4) was redesignated 269(e)(2) by the 1967 amendment to Section 269].

3. This office agrees with your interpretation that Hornstein v. Laird requires that members of units of the 77 ARCOM who reported to their USAR centers as required on 24 March 1970 and who were subsequently dismissed because their units were not ordered to active duty by the DA Message must be considered as having served on active duty within the meaning of 10 U.S.C. 269(e)(2). Therefore, a reservist who falls into the above category and who meets the other requirement of 10 U.S.C. 269(e)(2) [". . . satisfactorily participated, as determined by the Secretary concerned, in an accredited training program in the Ready Reserve for a period which, when added to his period of active duty (other than for training), totals at least five years. . . ."] is entitled to transfer to the Standby Reserve upon his request. Reservists who failed to report to their units of course did not serve on active duty and are not entitled to transfer to the Standby Reserve. Mandelker v. United States of America, et al., S.D.N.Y., 8 Jan 73, 71 Civ 2335 DSB. (Incl 2).

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Exhibit A

DAAA-LTP

4. In cases where records no longer exist to prove that a particular reservist did or did not report to his USAR center on 24 March 1970, your recommendation that such reservist be required to submit affidavits proving that he did in fact report to his unit on 24 March 1970 is eminently sound and should be implemented.
5. Reservists who were on active duty for training at the time of the postal strike and whose units were ordered to active duty by the Department of the Army are to be considered as having served on active duty so as to qualify for transfer under the provisions of 10 U.S.C. §269(e)(2). Likewise, reservists who were on active duty for training at the time of the postal strike whose units, though not ordered to active duty by the DA Message, were directed to report by the commander of the 77th ARCOM by means of the announcement broadcast over New York radio and television stations are to be considered as having served on active duty so as to qualify for transfer under the provisions of 10 U.S.C. §269(e)(2). Thus the request of Specialist Five Martin S. Mazur for transfer to the Standby Reserve must be considered just as if he had reported to his USAR center on the morning of 24 March 1970 and remained there until his unit was dismissed. This result is required by the holding in Hornstein coupled with the applicable provisions of AR 135-300, 7 August 1969 [para. 2-38; 2-58(2)f. (5); Incl. 3] as interpreted by the proponent of the regulation.
6. Requests for transfer by reservists who reported on 24 March 1970 and were then dismissed because their units were not designated for order to active duty in the DA Message should be processed in accordance with the same procedures utilized for such request by reservists whose units were listed on the DA Message.

FOR THE JUDGE ADVOCATE GENERAL:

3 Incls
a/s:

William B. Carne
WILLIAM B. CARNE
Colonel, JAGC
Chief, Litigation Division

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3

Exhibit A

44

EXECUTIVE ORDER
NELSON A. ROCKEFELLER, GOVERNOR

Ronald Maiorana, Press Secretary
518-474-3416 (Albany); 212-JU 2-7030 (NYC)

FOR RELEASE:
IMMEDIATE, WEDNESDAY
JUNE 10, 1970

Executive Order No. 39

E X E C U T I V E O R D E R

Consent to Transfer of certain
members of the New York Army
National Guard and the New York
Air National Guard to the
Standby Reserve

I, Nelson A. Rockefeller, by virtue of authority vested
in me as Governor by the Constitution and the laws of the State of
New York including Section 3 of the Military Law and by the laws of
the United States including Title 10 United States Code,
Section 269 (g), do hereby consent to the transfer to the Standby
Reserve of those members of the New York Army National Guard and
New York Air National Guard, otherwise qualified, who apply for such
transfer, and who complete five years of satisfactory service from
the date of their enlistment and who performed full time duty in the
active military service of the United States pursuant to
Proclamation 3972 (35 Federal Register 5001) dated March 23, 1970,
and Executive Order 11519 (35 Federal Register 5003) dated
March 23, 1970, issued by the President of the United States, and
do hereby authorize and direct the Chief of Staff to the Governor to
accept applications for such transfers and institute appropriate
processes to effect transfer of qualified applicants and soon as
possible.

G I V E N under my hand and the

Privy Seal of the State at
the Capitol in the City of Albany

(L.S.)

Albany this tenth day of June
in the year of our Lord one
thousand nine hundred and
seventy.

(Signed) Nelson A. Rockefeller

BY THE GOVERNOR:

(Signed) Alton G. Marshall

Secretary to the Governor

Exhibit B

45

STATE OF NEW YORK
DIVISION OF MILITARY AND NAVAL AFFAIRS
PUBLIC SECURITY BUILDING
STATE CAMPUS
ALBANY, NEW YORK 12220

NELSON A. ROCKEFELLER
Governor
COMMANDER-IN-CHIEF

MAJOR GENERAL A. C. O'HARA
Chief of Staff to the Governor

MNPA-AS

10 June 1970

Dear

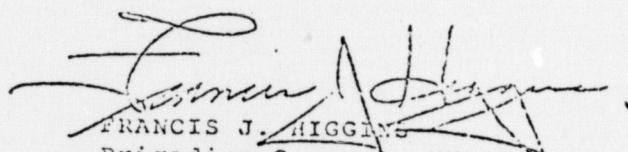
Reference your telegram of 1970, Governor Rockefeller has determined that New York National Guardsmen are eligible for discharge from the New York National Guard and transfer to the Standby Reserve after 5 years of satisfactory participation in the National Guard, provided they have performed Active Duty.

Each individual in this category who desires discharge from the New York Army National Guard and transfer to the Standby Reserve must make application to his unit commander and must continue to participate satisfactorily until his discharge has become effective.

Requests will be processed in the order in which they are received by this office. However, in view of the major administrative burden involved, no discharge will become effective prior to 1 July 1970.

Qualified Guardsmen will be excused from Annual Field Training after they have personally submitted their applications for discharge to their unit commanders.

Sincerely,


FRANCIS J. HIGGINS
Brigadier General, NYARNG
The Adjutant General

FJH/ma

Exhibit C

46

Chief of Staff that he request the Governor to issue a new executive order which would clearly exclude plaintiffs and those

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ARTHUR S. KURLAN, et al.,

Plaintiffs,

-against-

HOWARD H. CALLAWAY, SECRETARY OF THE
ARMY, MALCOLM WILSON, GOVERNOR OF THE
STATE OF NEW YORK and MAJOR GENERAL
JOHN C. BAKER, COMMANDING GENERAL,
NEW YORK ARMY NATIONAL GUARD,

Defendants.

74 Civ. 2986

ORDER TO SHOW CAUSE

For Preliminary
Injunction

Upon the annexed affidavit of STEVEN J. HYMAN, sworn
to the 10th day of July, 1974, the summons and complaint previous-
ly filed herein, with exhibits annexed thereto, and upon all
other papers and proceedings heretofore had herein, it is

ORDERED, that pursuant to Rule 65 of the Federal
Rules of Civil Procedure, the defendant, or their attorneys,
show cause before a Judge of this court at the United States
Court House, Room 1505 Foley Square, New York, New York on
the 18th day of July, 1974, at 4:30 o'clock in the afternoon
thereof, or as soon thereafter as counsel can be heard, why
an order should not be entered granting plaintiffs' motion for
preliminary injunction enjoining the defendants, their agents,
servants and employees from requiring plaintiffs who have com-
pleted their fifth year of service and each other plaintiff as
he completes his fifth year of service to attend further annual
field training and drills subsequent to their completion of five
years of satisfactory service and ordering and directing de-
fendants to transfer each plaintiff as he completes his fifth
year of satisfactory service from the Ready Reserve to the Stand-
by Reserve, pursuant to Title 10 U.S.C. §269(e) and Army Regula-
tion 135-91, ¶17(b), pending a trial and entry of final judgment
on the merits herein, and for such other and further relief as
this Court may deem just, and it is further

ORDERED, that a copy of this order, together with
the papers upon which it is granted, be personally served upon

(ORDER TO SHOW CAUSE) 47

the United States Attorney for the Southern District of New York
on or before the 12th day of July, 1974, at 5:00 o'clock in
the afternoon, on behalf of the defendant CALLAWAY, and that
a copy of this order, together with the papers upon which it is
granted be personally served upon the Attorney General of the
State of New York at his offices at the World Trade Center, on or
before the 15th day of July, 1974, at 12:00 o'clock in the
noon, on behalf of the defendants WILSON and BAKER, and that
such service upon such parties be deemed good and sufficient
service.

S/ Robert J. Ward

U.S.D.J.

Issued at: New York, New York
July 12, 1974
3:30 PM

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EXECUTIVE ORDER NO. 8

E X E C U T I V E O R D E R

Amending and superseding the Executive

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ARTHUR S. KURLAN, et al., ^{*/}

Plaintiffs,

Civ. No.

-against-

AFFIDAVIT

HOWARD H. CALLAWAY, SECRETARY OF THE
ARMY, MALCOLM WILSON, GOVERNOR
OF THE STATE OF NEW YORK and MAJOR
GENERAL JOHN C. BAKER, COMMANDING GENERAL,
NEW YORK ARMY NATIONAL GUARD,

Defendants.

STATE OF NEW YORK)
 (ss.:
COUNTY OF NEW YORK)

STEVEN J. HYMAN, being duly sworn, deposes and says:

1. I am a member of the firm of Kunstler Kunstler Hyman & Goldberg, attorneys for the plaintiffs herein. I make this affidavit in support of a request for an order to show cause why a preliminary injunction should not be granted pursuant to Rule 65 of the Federal Rules of Civil Procedure on behalf of the plaintiffs above-named.

2. Annexed to this affidavit is a copy of the summons and complaint in this action with exhibits, setting forth the full cause of action asserted by plaintiffs against defendants.

3. This case involves plaintiffs' request to be transferred to the Standby Reserve of the United States Army upon completion of five years of service in the New York Army National Guard of the United States, a component of the Ready Reserve. Plaintiffs seek such transfer pursuant to Title 10 U.S.C. §269(e) and Army Regulation 135-91 ¶17(b).

4. Annexed to the complaint as Appendix A is a list of the plaintiffs named in this action, the units to which they are assigned and the date on which they complete their fifth year of service and enter upon their sixth year of service. It is this date which is critical for plaintiffs since it is at that time that they will qualify for transfer to the Standby Reserve, pursuant to §269(e) of Title 10.

^{*/} A complete list of plaintiffs is set forth as Appendix A to the complaint.

(AFFIDAVIT OF STEVEN J. HYMAN)

5. Immediate relief is needed for certain plaintiffs who have completed their fifth year in either June or July, 1974, as set forth in Appendix A. Thereafter, other plaintiffs will complete their fifth year of service in August and each succeeding month up to and including February 1975.

6. The issue for each plaintiff is exactly the same and a determination as to one will be a determination as to all on the issue of whether they qualify for transfer to the Standby Reserve.

7. Plaintiffs therefore move for a preliminary injunction which will be prospective in nature and which will cover each plaintiff as he completes his fifth year. The form of the preliminary injunction requested is the same as that accorded plaintiffs in Hornstein v. Laird, 327 F. Supp. 993, (S.D. N.Y. 1971) where Judge Bonsal granted a preliminary injunction to cover all plaintiffs, even those who had not yet completed their fifth year of service.

8. The basis for plaintiffs' motion for preliminary injunction in this case is, of course, grounded in the opinion of Judge Ward in Mela v. Callaway, 74 Civ. 2153, opinion filed June 5, 1974, S.D. N.Y. That case is on all fours with the issues presented in the case at bar. In fact, the only reason plaintiffs do not join in that suit directly is that a notice of appeal has been filed and there would be additional questions of jurisdiction in the District Court to deal with the issues in that case, pending appeal.

9. Plaintiffs have therefore commenced this new action which is related in all respects to the prior action of Mela v. Callaway. The issues presented by the request for this preliminary injunction have been dealt with in detail by Judge Ward.

10. As set forth above, plaintiffs who qualified for transfer in June or July will suffer immediate and irreparable harm unless this preliminary injunction is granted and they are given the same rights and benefits accorded to plaintiffs in

Mela v. Callaway. A copy of said order entered in Mela v. Callaway is annexed hereto as Exhibit A. Further, speed is required since plaintiff WASSMER is scheduled to enter upon summer camp on July 27, notwithstanding that he is qualified for transfer to the Standby Reserves as of June 27th, 1974.

11. This Court has previously held that persons in plaintiffs' position will suffer irreparable injury and therefore a preliminary injunction is warranted.

12. Plaintiffs proceed by order to show cause, pursuant to Rule 65, because plaintiffs KURLAN and WASSMER are already entitled to be relieved of further obligations of attending unit drills and/or summer camp, and other plaintiffs will soon be likewise entitled to such relief during the months of July and the coming month of August. Plaintiffs therefore proceed by order to show cause in order to bring the matter on as expeditiously as possible.

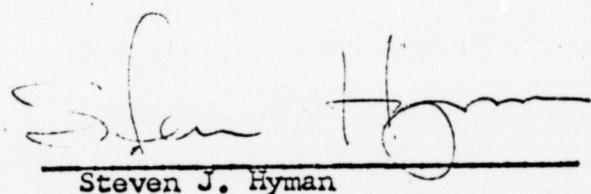
13. In view of the prior decisions of this Court, defendants will suffer no prejudice by the granting of this motion for preliminary injunction, since plaintiffs have every likelihood of success.

14. Plaintiffs have no adequate remedy at law.

15. No prior application has been made for the relief herein requested.

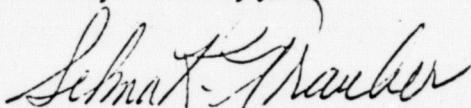
16. It is specifically requested that this case be assigned to Judge Robert Ward for all purposes in that this case involves the same issues of fact and questions of law as were present in the case of Mela v. Callaway, 74 Civ. 2153, which has been assigned to Judge Ward. Since Judge Ward has already filed an opinion granting a preliminary injunction involving the exact same facts and law, it is appropriate that the case be referred to Judge Ward.

WHEREFORE, it is respectfully requested that a preliminary injunction issue and that plaintiffs, during the pendency of this action and until the entry of final judgment, be granted an injunction enjoining defendants from requiring plaintiffs to attend New York Army National Guard unit training assemblies and annual training, as said plaintiffs complete their fifth year of service in the New York Army National Guard, and for such other and further relief as this Court may deem just in the premises.



Steven J. Hyman

Sworn to before me this
10th day of July, 1974.



SELMA K. TRAUBER
Notary Public, State of New York
No. 24-9372320
Qualified in Kings County
Commission Expires March 30, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
ANGELO MELA, SALVATORE V. IMBURGIO, :
JOHN G. PALUMBO, MARTIN KLEINMAN, :
RICHARD W. BLACK, MICHAEL GRIFFIN, :
GREGORY PRINSMAN, ROBERT M. CONEK, :
ARTHUR BLOOM, KENNETH LANDA, ROBERT :
R. SFORZO and JAMES W. CASTLE, :

Plaintiffs,

-against-

HOWARD H. CALLAWAY, SECRETARY OF THE :
ARMY, MALCOLM WILSON, GOVERNOR OF THE :
STATE OF NEW YORK and MAJOR GENERAL :
JOHN C. BAKER, COMMANDING GENERAL :
NEW YORK ARMY NATIONAL GUARD, :

ORDER

74 Civ 2153

Defendants.

-----X

The plaintiffs' motion for a preliminary injunction pursuant to Federal Rules of Civil Procedure, Rule 65 and the motion of defendants Wilson and Baker to dismiss the complaint or for summary judgment pursuant to Federal Rules of Civil Procedure, Rules 12(b)(1)(S), (h)(3) and 56(b) having come on to be heard before me on May 24, 1974 and the Court having filed its decision granting plaintiffs' motion and denying said defendants' motion, it is

ORDERED, that plaintiffs' motion for a preliminary injunction be and is hereby, granted; and it is further

ORDERED, that defendants' motion be and is hereby, denied; and it is further

ORDERED, that plaintiffs' undertaking pursuant to Rule 65(c) is set in the sum of \$ 250⁰⁰, to be posted with the Clerk of this Court; it is further

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Exhibit A

ORDERED, that upon the furnishing of said undertaking, during the pendency of this action and until the entry of final judgment, defendants be and are, hereby enjoined from requiring plaintiffs to attend New York Army National Guard unit training assemblies and annual training.

Dated: New York, New York
June 7, 1974
o'clock ~~—~~ m.

SJ Robert WARD
U.S.D.J.

EXECUTIVE CHAMBER
NELSON A. ROCKEFELLER, GOVERNOR

Ronald Malorana, Press Secretary

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

ARTHUR S. KURLAN, et al.,	:
Plaintiffs,	:
-against-	: NOTICE OF MOTION
HOWARD H. CALLAWAY, SECRETARY OF THE ARMY, MALCOLM WILSON, GOVERNOR OF THE STATE OF NEW YORK and MAJOR GENERAL JOHN C. BAKER, COMMANDING GENERAL, NEW YORK ARMY NATIONAL GUARD,	: 74 Civ. 2986 (R.J.W.)
Defendants.	:

-----X

S I R S :

PLEASE TAKE NOTICE, upon the annexed statement pursuant to General Rule 9(g); the affidavit ROBERT S. HAMMER, ESQ., sworn to July 18 and July 23, 1974 and upon the pleadings and prior proceedings had herein. The undersigned will move this Court, by submission to HON. ROBERT J. WARD, District Judge at the United States Courthouse, Foley Square, New York, New York, on July 30, 1974, for an order pursuant to Fed. R. Civ. P., Rules 12(b)(1)(6), (h)(3) and 56(b) dismissing this action or granting summary judgment to defendants Wilson and Baker, and for such other and further relief as to the Court may seem

ONLY COPY AVAILABLE

(NOTICE OF MOTION)

just and proper, together with said defendants costs and disbursements.

Dated: New York, New York
July 23, 1974

Yours, etc.,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York

By


ROBERT S. MELLINK
Assistant Attorney General
Attorney for defendants Wilson
and Baker
Office & P.O. Address
Two World Trade Center
New York, New York 10047
Tel. No. 488-3394

TO: KUNSTLER, KUNSTLER, HYMAN
& COLBERG, ESQ'S.
370 Lexington Avenue
New York, New York 10017

HON. PAUL J. CURRAN
United States Attorney
Southern District of New York
Attorney for Defendant Callaway
United States Courthouse
New York, New York 10007
Attn: Louis G. Corsi, Esq.
Assistant United States Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

ARTHUR S. KURLAN, et al., :
Plaintiffs, :
-against- : STATEMENT PURSUANT TO
HOWARD H. CALLAWAY, SECRETARY OF THE : GENERAL RULE 9(c)
ARMY, MALCOLM WILSON, GOVERNOR OF THE : 74 Civ. 2986 (R.J.W.)
STATE OF NEW YORK and MAJOR GENERAL :
JOHN C. BAKER, COMMANDING GENERAL, :
NEW YORK ARMY NATIONAL GUARD, :
Defendants. :
-----X

Defendants Wilson and Baker contend that there are no triable issues as to the following material facts:

1. Plaintiffs are members of the New York Army National Guard, and had assumed that status prior to March 23, 1970.
2. Pursuant to a proclamation of the President of the United States dated March 23, 1970, plaintiffs' National Guard units were called into active federal service.
3. During the period of time when plaintiffs' units were on active federal service, plaintiffs were not physically present with them, but were performing active duty for training with the United States Army.
4. The Governor of the State of New York has not consented to the transfer of plaintiffs, and those similarly situated, to the standby reserve upon the satisfactory completion

by them of five years service in the National Guard, but, in fact has specifically denied them such consent.

Dated: New York, New York
July 23, 1974

Yours, etc.,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
By


ROBERT S. MILLER
Assistant Attorney General
Attorney for Defendants Wilson
and Baker
Office & P.O. Address
Two World Trade Center
New York, New York 10047
Tel. No. 488-3394

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
ANGELO MELA, et al., :
Plaintiffs, :
-against- : 74 Civ. 2153
HOWARD H. CALLAWAY, Secretary of the Army, et al., :
(R.J.W.)
Defendants. :
-----X

AFFIDAVIT

ARTHUR S. KURLAN, et al., :
Plaintiffs, :
-against- : 74 Civ. 2986
HOWARD H. CALLAWAY, Secretary of the Army, et al., :
Defendants. :
-----X

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

ROBERT S. HAMMER, being duly sworn, deposes and says:

I am an Assistant Attorney General in the office of LOUIS J. LIPKOWITZ, Attorney General of the State of New York, attorney for defendants Wilson and Baker herein. I make this affidavit in support of said defendants' motion to vacate the preliminary injunction in Mela and for summary judgment in Kurlan.

Following this Court's decision in Mela, consultations were had between your deponent and the State Judge Advocate as to the course of action that the State of New York ought to take in the light thereof. It was determined to recommend to the

Chief of Staff that he request the Governor to issue a new executive order which would clearly exclude plaintiffs and those similarly situated from those having permission to transfer from the Army National Guard to the Standby Reserve pursuant to 10 U.S.C. § 269(g).

The bases for this recommendation were the military needs of the State and relative equities of the position of those who actually served with their units during the postal strike and those who were performing active duty for training under federal auspices at the time.

KJ

It was determined that approximately 2,000 members of the Army National Guard were performing and continued to perform active duty for training when their units were called up. Their services were not used in the postal strike. Those who actually served with their units incurred an additional burden that plaintiffs never bore; their civilian routines were unexpectedly interrupted. Plaintiffs were simply receiving the basic training that they expected to undergo when they joined the National Guard. For this reason, it was felt that plaintiffs were not deserving of a "windfall" in the form of an early discharge.

Moreover, the loss of these 2,000 men would impair the effectiveness of their units in the event of their call to State or Federal active service. In the case of the 42nd Infantry (Rainbow) Division, the principal New York National unit, these personnel losses would reduce its strength to such an extent that its federal recognition and the considerable federal subsidy that accompanies such recognition would be impeded.

It was for these reasons, Governor Wilson issued his Executive Order No. 8 dated July 10, 1974, a copy of which is annexed hereto.

[Signature]
ROBERT S. HAYMAN

Sworn to before me this
23rd day of July, 1974

S/ Arnold D. Flaxman

Assistant Attorney General
of the State of New York

E X E C U T I V E O R D E R

Amending and superseding the Executive Order of June 10, 1970 consenting to the transfer of certain members of the New York Army National Guard and the New York Air National Guard to the Standby Reserve as continued by the Executive Order dated December 18, 1973

I, Malcolm Wilson, Governor of the State of New York, by virtue of the authority vested in me by the Constitution and the laws of the State of New York, do hereby direct by Executive Order that Executive Order Number 39 dated June 10, 1970 consenting to the transfer of certain members of the New York Army National Guard and the New York Air National Guard to the Standby Reserve, as continued by Executive Order Number 1 dated December 18, 1973, be amended to read as follows:

By virtue of the authority vested in me by the Constitution and laws of the State of New York including section 3 of the Military Law and by the laws of the United States including Title 10, United States Code, Section 269 (g), I, Malcolm Wilson, Governor of the State of New York do hereby consent to the transfer to the standby reserve of those members of the New York Army National Guard and the New York Air National Guard, otherwise qualified, who apply for such transfer, and who complete five years of satisfactory service from the date of their enlistment and who actually performed full time duty with their assigned units in the active military service of the United States pursuant to Proclamation 3972 (35 Federal Register 5001) dated March 23, 1970, and Executive Order 11519 (35 Federal Register 5003) dated March 23, 1970, issued by the President of the United States, and do hereby authorize and direct the Chief of Staff to the Governor to accept applications for such transfers and institute processes to affect transfer of qualified applicants as soon as possible, provided, however, that nothing contained herein shall be construed to authorize or permit the transfer to the standby reserve of any member of the New York Army National Guard or the New York Air National Guard who did not actually perform such full time duty with their assigned unit because of their absence from such unit for active duty for training.

G I V E N under my hand and the

Privy Seal of the State at the
Capitol in the City of Albany
this 10th day of July in the
year of our Lord one thousand
nine hundred seventy-four.

(L.S.)

(signed) Malcolm Wilson

EXHIBIT B

zation of the Reserve components and other manpower resources of the Nation and within supportable resource capabilities.

i. Home station. The assigned permanent location or assembly point of ARNGUS and USAR units (location of armory or training center) and initial active-duty station.

the Reserve components who are liable for involuntary active duty not only in time of war, national emergency as declared by Congress, or when otherwise authorized by law, but also in time of national emergency declared by the President.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

ARTHUR S. KURLAN, et al., :
Plaintiffs, :
-against- :
HOWARD H. CALLAWAY, Secretary of the :
Army, MALCOLM WILSON, Governor of the :
State of New York and MAJOR GENERAL :
JOHN C. BAKER, Commanding General, :
New York Army National Guard, :
Defendants. :
-----X

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

ROBERT S. HAMMER, being duly sworn, deposes and says:

I am an Assistant Attorney General in the office of LOUIS J. LEFKOWITZ, Attorney General of the State of New York, Attorney for defendants Wilson and Baker. I make this affidavit in opposition to the instant motion for a preliminary injunction.

The legal and factual issues herein are essentially the same as those in Mela v. Callaway, 74 Civ. 2153 (RJW).

In Mela, this Court found that plaintiffs would prevail on their claim of entitlement to transfer the standby reserve in the absence of a further showing from defendants, on the theory that the Governor had consented to such transfer pursuant to 10 USC § 269(g), op., June 5, 1974 pp 6-7. This Court specifically rejected their claims of entitlement to transfer in the absence of such consent, id., pp. 3-5.

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(AFFIDAVIT OF ROBERT S. HAMMER)

In this case, plaintiffs, some 209 of them, proceed upon both theories. Since the Court has already decided that the consent of the Governor is required I shall deal at length only with the question of such consent and respectfully refer the Court to my papers in Mela and rely on the Court's opinion therein on the question of the proper construction of 10 USC § 260.

On July 11, 1974, Governor Wilson signed an amended Executive Order which limits consent to transfer to the standby reserve to those who physically reported to their units when they were called to active duty during the postal strike. Accordingly, even assuming, arquendo, that plaintiffs had, at one time given permission to transfer to the standby reserve, such permission has been revoked because of the needs of the State. A copy of the Amended Executive Order is annexed hereto as Exhibit A. Thus, under the rationale of the Mela decision, plaintiffs are not entitled to relief since permission to transfer to standby status was revoked prior to any change to that status.

WHEREFORE, it is respectfully requested that plaintiffs' motion be denied in all respects.

ROBERT S. HAMMER

Sworn to before me
this 13th day of July, 1974

Assistant Attorney General
of the State of New York

ONLY COPY AVAILABLE

7 August 1969

AR 135-300

The Flag is the symbol of our heritage of freedom and of our aspirations for justice and freedom for all men. It is therefore most fitting that we continue the tradition of observing this anniversary of our national symbol.

NOW, THEREFORE, I, Nelson A. Rockefeller, Governor of the State of New York, do hereby proclaim June 14, 1970, as

FLAG DAY

in New York State.

GIVEN under my hand and the Privy Seal of the State at the Capitol in the City of Albany this ninth [L. S.] day of June in the year of our Lord one thousand nine hundred and seventy.

By the Governor: (Signed) NELSON A. ROCKEFELLER

(Signed) ALTON G. MARSHALL
Secretary to the Governor

New York National Guard Release from Active Reserve

STATE OF NEW YORK—EXECUTIVE CHAMBER

WHEREAS, the Governor is Commander in Chief of the Military of the State pursuant to the Constitution of the State as recited in Section three of the Military Law; and

WHEREAS, the President of the United States by Proclamation 3972 (35 Federal Register 5001) dated March 23, 1970, declared a state of national emergency in connection with a work stoppage by certain employees in the Postal Service and by Executive Order 11519 (35 Federal Register 5003) dated March 23, 1970, authorized and directed the Secretary of Defense to order and call into the active military service of the United States such of the reserve components of the armed forces as were necessary to assist the Postmaster General to restore and maintain postal service, and to execute the Postal laws of the United States including members and units of the New York Army and Air National Guard; and

WHEREAS, members of the New York Army National Guard and New York Air National Guard and members of other reserve components of the Armed Forces of the United States were called and ordered into the active military service of the United States pursuant to the order of the President and in accordance with the provisions of Title 10 United States Code, Sections 673, 3500 and 8500 and, as a result, certain of these members did serve in the active military service of the United States as directed; and

WHEREAS, certain members of reserve components, other than the National Guard are eligible, upon individual application, by virtue of their service on active duty during the work

(PROCLAMATION OF GOVERNOR ROCKEFELLER)

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stoppage, for transfer pursuant to Title 10, United States Code, Section 269 (e) (2) to the Standby Reserve from the Ready Reserve after completing five (5) years of satisfactory service from the date of their enlistment; and

WHEREAS, certain members of the New York Army National Guard and New York Air National Guard are eligible, upon individual application, by virtue of their service during the work stoppage for transfer pursuant to Title 10 United States Code, Section 269 (e) (2) to the Standby Reserve from the Ready Reserve after completing five (5) years of satisfactory service from the date of their enlistment, with the consent of the Governor.

Now, THEREFORE, I, Nelson A. Rockefeller, by virtue of the authority vested in me by the Constitution and laws of the State of New York, including Section three of the Military Law, and Title 10, United States Code, Section 269 (g), have this day by Executive Order consented to the transfer to the Standby Reserve of those members of the New York Army and Air National Guard, otherwise qualified, who have performed active duty during the work stoppage, complete five (5) years of satisfactory service since enlistment and make application for transfer, and have ordered the Chief of Staff to the Governor to accept applications for such transfers and institute appropriate processes to effect transfer of qualified applicants as soon as possible.

GIVEN under my hand and the Privy Seal of the State at the Capitol in the City of Albany this tenth [L. S.] day of June in the year of our Lord one thousand nine hundred and seventy.

By the Governor: (Signed) NELSON A. ROCKEFELLER

(Signed) ALTON G. MARSHALL
Secretary to the Governor

New York Beef Industry Day

STATE OF NEW YORK—EXECUTIVE CHAMBER

The beef industry is an important segment of the food economy of the Empire State.

Beef has long been recognized as one of our most nutritious foods, rich in protein and all health-building factors, beneficial to people of all ages, from the very young to the very old.

It is important that we recognize the value of beef in the everyday diet of our people.

Now, THEREFORE, I, Nelson A. Rockefeller, Governor of the State of New York, do hereby proclaim June 21, 1970, as

EXECUTIVE ORDER
NELSON A. ROCKEFELLER, GOVERNOR

Ronald Malorana, Press Secretary
518-474-3416 (Albany); 212-JU 2-7030 (NYC)

RELEASE:
IMMEDIATE, WEDNESDAY
JUNE 10, 1970

Executive Order No. 39

E X E C U T I V E O R D E R

Consent to Transfer of certain
members of the New York Army
National Guard and the New York
Air National Guard to the
Standby Reserve

I, Nelson A. Rockefeller, by virtue of authority vested
in me as Governor by the Constitution and the laws of the State of
New York including Section 3 of the Military Law and by the laws of
the United States including Title 10 United States Code,
Section 269 (g), do hereby consent to the transfer to the Standby
Reserve of those members of the New York Army National Guard and
New York Air National Guard, otherwise qualified, who apply for such
transfer, and who complete five years of satisfactory service from
the date of their enlistment and who performed full time duty in the
active military service of the United States pursuant to
Proclamation 3972 (35 Federal Register 5001) dated March 23, 1970,
and Executive Order 11519 (35 Federal Register 5003) dated
March 23, 1970, issued by the President of the United States, and
do hereby authorize and direct the Chief of Staff to the Governor to
accept applications for such transfers and institute appropriate
processes to effect transfer of qualified applicants and soon as
possible.

(L.S.)

G I V E N under my hand and the
Privy Seal of the State at
the Capitol in the City of Albany
Albany this tenth day of June
in the year of our Lord one
thousand nine hundred and
seventy.

(Signed) Nelson A. Rockefeller

BY THE GOVERNOR:

(Signed) Alton G. Marshall

Secretary to the Governor

ONLY COPY AVAILABLE

(EXECUTIVE ORDER OF GOVERNOR ROCKEFELLER #39) 66

STATE OF NEW YORK
EXECUTIVE CHAMBER
MALCOLM WILSON, GOVERNOR

Harry O'Donnell, Press Secretary
518-474-8418

Giac Chiaro

FOR RELEASE:
IMMEDIATE, WEDNESDAY
DECEMBER 19, 1973

EXECUTIVE ORDER NO. 1

E X E C U T I V E O R D E R

Relating to the continued
validity of executive orders
previously issued

Having determined it to be in the public interest that there be no doubt as to the continued validity and effectiveness of executive orders heretofore issued by the Governors of the State of New York and now in effect, I, Malcolm Wilson, Governor of the State of New York, by virtue of the authority vested in me by the Constitution and laws of the State of New York, do hereby direct by executive order that all executive orders and amendments thereto heretofore issued and promulgated and in effect as of this date shall remain in full force and effect until otherwise revoked or modified.

G I V E N under my hand and
the Privy Seal of the State
at the Capitol in the City
of Albany this eighteenth
day of December in the year
of our Lord one thousand
nine hundred seventy-three.

BY THE GOVERNOR: (Signed) MALCOLM WILSON

(Signed) T. N. Hurd
Secretary to the Governor

- 30 -

EXHIBIT A

67

(EXECUTIVE ORDER OF GOVERNOR WILSON #1)

AP 107 200

EXECUTIVE ORDER NO. 8

E X E C U T I V E O R D E R

Amending and superseding the Executive Order of June 10, 1970 consenting to the transfer of certain members of the New York Army National Guard and the New York Air National Guard to the Standby Reserve as continued by the Executive Order dated December 18, 1973

I, Malcolm Wilson, Governor of the State of New York, by virtue of the authority vested in me by the Constitution and the laws of the State of New York, do hereby direct by Executive Order that Executive Order Number 39 dated June 10, 1970 consenting to the transfer of certain members of the New York Army National Guard and the New York Air National Guard to the Standby Reserve, as continued by Executive Order Number 1 dated December 18, 1973, be amended to read as follows:

By virtue of the authority vested in me by the Constitution and laws of the State of New York including section 3 of the Military Law and by the laws of the United States including Title 10, United States Code, Section 269 (g), I, Malcolm Wilson, Governor of the State of New York do hereby consent to the transfer to the standby reserve of those members of the New York Army National Guard and the New York Air National Guard, otherwise qualified, who apply for such transfer, and who complete five years of satisfactory service from the date of their enlistment and who actually performed full time duty with their assigned units in the active military service of the United States pursuant to Proclamation 3972 (35 Federal Register 5001) dated March 23, 1970, and Executive Order 11519 (35 Federal Register 5003) dated March 23, 1970, issued by the President of the United States, and do hereby authorize and direct the Chief of Staff to the Governor to accept applications for such transfers and institute processes to affect transfer of qualified applicants as soon as possible, provided, however, that nothing contained herein shall be construed to authorize or permit the transfer to the standby reserve of any member of the New York Army National Guard or the New York Air National Guard who did not actually perform such full time duty with their assigned unit because of their absence from such unit for active duty for training.

G I V E N under my hand and the
Privy Seal of the State at the
Capitol in the City of Albany
this 10th day of July in the
year of our Lord one thousand
nine hundred seventy-four.

(L.S.)

(signed) Malcolm Wilson

EXHIBIT B

(EXECUTIVE ORDER OF GOVERNOR WILSON #8) 68.

n
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ARMY REGULATION
No. 135-91

HEADQUARTERS
DEPARTMENT OF THE ARMY
WASHINGTON, D.C., 11 June 1968

RESERVE COMPONENTS

POLICIES AND PROCEDURES GOVERNING SATISFACTORY PARTICIPATION

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Members of units inactivated, reorganized, or relocated	1
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Excused absences	1
Equivalent training	1
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Orientation	1
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This copy is a reprint which includes current pages from Changes 1 and 2

1. Purpose. This regulation prescribes policies, procedures, and responsibilities pertaining to satisfactory completion of the Ready Reserve service obligation and enforcement procedures pertaining thereto for certain enlisted male personnel of the Reserve components.

2. Effective date. This regulation is effective 1 July 1968.

3. Applicability. a. The instructions contained in this regulation are applicable to enlisted members of the ARNG and USAR who have an unfulfilled Ready Reserve obligation and who have not served on active duty/ACDUTRA (to include annual active duty for training, full-time training duty,

and annual field training) for a combined period of 24 months.

b. Whenever the instructions set forth herein conflict with existing regulations, the provisions of this regulation apply.

4. Service obligations. The service obligations incurred by enlisted members upon transfer to or initial enlistment in the USAR and ARNG are as follows:

a. Reserve Enlistment Program of 1963 (REP' 63). Each nonprior service male who initially enlists in the USAR or ARNG on or after 11 August 1963 while age—

*This regulation supersedes DA Circular 135-10, 29 May 67, including C 1, and RCPC message 31, 16 April 1968.

EXB

must be met immediately, and which cannot be discharged by any other individual, delay may be authorized. In addition, delay may be authorized for any other emergency situation which may not specifically meet the above requirements but where the individual's entry on active duty would create a severe and unusual hardship on either himself or his family. Renewal of delay for this purpose may be granted not to exceed 60 days.

(7) *Temporary illness or injury.* An enlisted member who is temporarily ill or injured and who is otherwise medically fit for retention but is unable to perform active duty will be delayed for a period recommended by a physician not to exceed 1 year. If the period of delay recommended by the physician exceeds 1 year, processing under appropriate medical regulations will be accomplished.

d. *Gaining unit membership during period of delay.* EM who have been ordered to active duty in accordance with paragraph 6, for failure to maintain unit membership, and who while in an approved delay status are able to gain unit membership will not be ordered to active duty but will be required to immediately commence training with the unit in which they have been accepted. The authority who granted the delay will take necessary action to revoke the member's orders for active duty and to assign the member to his new unit.

17. **Separation from active duty.** Army regulations pertaining to Active Army members will apply. Except for those who are discharged due to expiration of term of military service or other authorized reasons, upon completion of active duty, members will be transferred as follows:

a. Those who have completed less than a total of 5 years' Ready Reserve and active Federal service will be transferred to the USAR Control Group (Annual Training).

b. Those who have completed a total of five but less than 6 years' Ready Reserve and active Federal service will be transferred to the Standby Reserve.

18. **Discharge.** This paragraph prescribes the criteria and procedures governing the discharge under the specific conditions set forth below.

a. *Dependency/hardship.*

(1) *Dependency.* Discharge may be approved when the following conditions exist:

(a) A member has four or more individuals dependent upon him for 50 percent or more of their support.

(b) When by reason of death or disability of a member of his family, members of the enlisted person's family become principally dependent upon him for care or support to the extent that service on active duty would result in undue and genuine hardship, provided—

1. Such dependency exists as a result of the death or disability of a member of the enlisted person's family occurring after his enlistment, or conditions resulting from the death or disability of a member of the enlisted person's family occurring prior to his entry into the service have been aggravated to such an extent as to necessitate his care or support of a member of his family. Pregnancy of an enlisted man's wife is not a disability for which his separation is authorized. However, this does not preclude separation on account of a disability of the enlisted man's wife occurring as a result of her pregnancy.

2. Dependency is not of a temporary nature.

3. Every reasonable effort made by the enlisted person to alleviate the dependency condition has been without success.

4. Discharge is the only readily available means of eliminating or materially alleviating the hardship created by the dependency conditions.

(2) *Hardship.* Discharge may be approved when service on active duty would result in undue and genuine hardship, provided—

(a) Such hardship conditions affecting members of the enlisted person's family have arisen after enlistment, or conditions existing in the enlisted person's family prior to enlistment have been aggravated to such an extent as to constitute undue and genuine hardship. Undue and genuine hardship does not necessarily exist solely because of altered income or because the enlisted person is separated from his family, or must suffer the inconveniences normally incident to military service.

(b) The hardship conditions are not of a temporary nature.

(c) The enlisted member has made every reasonable effort to alleviate hardship conditions without success.

ARMY REGULATION

AR 135-300

RESERVE COMPONENTS

MOBILIZATION OF ARMY NATIONAL GUARD OF THE UNITED STATES AND ARMY RESERVE UNITS

This copy is a reprint which includes current
pages from Change No. 1

Effective 1 October 1969



HEADQUARTERS, DEPARTMENT OF THE ARMY

AUGUST 1969

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(ARMY REGULATION 135-300)

ARMY REGULATION }

No. 135-300 }

HEADQUARTERS
DEPARTMENT OF THE ARMY
WASHINGTON, DC, 7 August 1969

RESERVE COMPONENTS

MOBILIZATION OF ARMY NATIONAL GUARD OF THE UNITED STATES AND ARMY RESERVE UNITS

Effective 1 October 1969

This is a complete revision of AR 135-300 and changes are made throughout. This regulation prescribes procedures for ordering to active duty units and unit members of the Army National Guard of the United States and the Army Reserve during mobilization or temporary expansion of the active Army; for ordering Army Reserve units to active duty for control of civil disturbances; and for calling to active duty Army National Guard units for mobilization and for control of civil disturbances. Local limited supplementation of this regulation is permitted but is not required. If supplements are issued, Army Staff agencies and major commands will furnish one copy of each to the Deputy Chief of Staff for Personnel, AFSC, DCSPER-PLD; other commands will furnish one copy of each to the next higher headquarters.

CHAPTER I. GENERAL

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2. ORDER TO ACTIVE DUTY

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UNITS AND THEIR MEMBERS

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*This regulation supersedes AR 135-300, 22 March 1965, including all changes.

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1

CHAPTER 1

GENERAL

1-1. Purpose. This regulation prescribes procedures for ordering to active duty units and unit members of the Army National Guard of the United States (ARNGUS) and the United States Army Reserve (USAR) to include ordering Army Reserve units to active duty for control of civil disturbances and for calling to active duty Army National Guard units and the members thereof for control of civil disturbances.

1-2. Scope. a. This regulation applies equally to ARNGUS and USAR units and unit members, except for procedural instructions which apply exclusively to the ARNGUS, ARNG, or to the USAR. Procedures outlined will be followed by Headquarters, Department of the Army agencies and commanders concerned in the preparation and implementation of mobilization plans and programs.

b. The provisions of this regulation will also apply when ordering units to active duty under a temporary expansion of the active Army without a declared emergency.

1-3. Explanation of terms. The following explanation of terms will apply:

a. **Accelerated mobilization.** Mobilization at a rate faster than programmed or planned, requiring entry on active duty of units without regard to planned schedules.

b. **Alert.** Any form of communication used by Headquarters, Department of the Army or other competent authority to first notify ARNGUS or USAR unit commanders that orders to active duty are pending for the unit. Simultaneously with the alert, or as soon as possible during the alert period, the unit will be provided with the effective date of entry on active

duty, mobilization station, TOE and other basic data as determined by the issuing authority.

c. **Competent authority.** Any authority designated by the Secretary of the Army, to include the Commanding General, U.S. Continental Army Command; the Commanding General, U.S. Army Air Defense Command; commanders of the U.S. Army air defense regional commands; and area commanders as defined in d below.

d. **Area commander.** CONUS and oversea commanders of areas as follows:

- (1) All CONUS armies, including MDW.
- (2) U.S. Army, Hawaii.
- (3) U.S. Army, Alaska
- (4) U.S. Army Forces Southern Command.
- (5) U.S. Army, Europe.
- (6) U.S. Army, Pacific.

e. **Call.** The procedures through which the President brings all or a part of the Army National Guard into the active military service of the United States under the provisions of Title 10, United States Code, chapter 15 and section 3500.

f. **Effective date.** The date designated by competent authority upon which a unit enters on active duty. This will be the date members are required to report at the home station.

g. **Fillers.** Individual reinforcements required to bring units to full (wartime) TOE and TDA strength when the current operating strength is less than full TOE or TDA.

h. **Full mobilization.** Action by Congress or the President to effect the maximum expansion of the active Armed Forces through utili-

zation of the Reserve components and other manpower resources of the Nation and within supportable resource capabilities.

i. *Home station.* The assigned permanent location or assembly point of ARNGUS and USAR units (location of armory or training center) and initial active duty station.

j. *Individual Ready Reserve.* Reinforcements administered by the U.S. Army Administration Center, St Louis, Missouri and comprised of the various Ready Reserve USAR control groups and other organizational elements to which reinforcements are assigned during peacetime.

k. *M-Day.* The term used to designate the day on which mobilization is to begin.

l. *Members.* Persons who are, by competent orders, assigned to troop program units of the ARNGUS or USAR.

m. *Mobilization.* The act of ordering ARNGUS and USAR units, and any member of the Reserve components not assigned to a unit organized to serve as a unit, to active duty under the authority contained in Title 10, United States Code, sections 672 and 673, or other specific legislation which may be enacted by the Congress for an emergency.

n. *Mobilization station.* The active duty station (i.e., on-site location) or mobilization center to which a unit is moved for further processing, organization, equipment, training and employment.

o. *Order.* The procedure through which the Reserve components (ARNGUS and USAR) enter into the active military service of the United States, pursuant to Title 10, United States Codes, sections 672 or 673, or other act of Congress.

p. *Partial mobilization.* Mobilization resulting from action by Congress or the President, under any law, to bring Reserve component units and individual reservists to active duty for a limited expansion of the active Armed Forces.

q. *Ready Reserve.* Units and members of the

the Reserve components who are liable for involuntary active duty not only in time of war, national emergency as declared by Congress, or when otherwise authorized by law, but also in time of national emergency declared by the President.

r. *Reinforcements.* Commissioned officers, warrant officers, and enlisted personnel who are members of the Individual Ready Reserve and who will, upon mobilization, be assigned as fillers to overseas and CONUS active Army units, to Reserve component units ordered to active duty, and to AUS units to be activated during the early months of mobilization.

s. *Replacements.* Personnel from active Army resources required to maintain mobilized Reserve component units at full authorized strength when there has been attrition of that strength subsequent to the effective date of call or order to active duty.

t. *State(s).* The 50 States, Commonwealth of Puerto Rico, and the District of Columbia.

u. *Structure strength.*

(1) The strength required for sustained performance of a general war mission for TOE units, or the prescribed mission of TDA units.

(2) TOE units: The required column of DA approved MTOE, Level one strength of "G" Series TOE, Type B column for appropriate units, or the full strength of "F" and earlier series TOE.

(3) TDA units: The required strength column.

(4) The terms "TO/TD," "TOE/TDA," and "Full/Required" strengths are synonymous with structure strength and related equipment authorization levels.

v. *Transaction code number.* A three-digit number which is used as a means of identifying the standard orders format and a code for machine processing, hereinafter referred to as "TC," followed by the three-digit number identifying the appropriate standard orders format set forth in AR 310-10.

w. *Unit.* The major organization mobilized (division) as distinguished from battalion,

company, battery, or detachment unless such elements are mobilized as separate and independent unit.

x. *USA Troop Program Unit.* A TOE or TA unit of the USAR which is organized to serve as such upon mobilization.

1-4. Statutory provisions. a. *Order.* All ARNGUS and USAR units of the Ready Reserve are subject to involuntary order to active duty either in time of war or national emergency declared by the Congress, or in time of national emergency proclaimed by the President in which the utilization of the Ready Reserve is authorized or directed (10 U.S.C. 672 and 673) or when otherwise authorized by law. Title 10, United States Code, section 673(c) provides that not more than one million members of the Ready Reserve may be on active duty (other than for training), without their consent, at any one time under the provisions of section 673. Of this total, the number allocated to each of the Armed Services will be specified by the Secretary of Defense in accordance with the emergency situation.

b. *Call.* The President has the authority to call all or part of the Army National Guard into the active military service of the United

States whenever the country is invaded or is in danger of invasion from any foreign nation, or there is a rebellion or danger of rebellion against the authority of the Government, or the President is unable with the regular forces at his command to execute the laws of the United States (10 U.S.C. 3500). Pursuant to Title 10, United States Code, chapter 15, the President may call the Army National Guard to suppress insurrection, rebellion, or interference with State and Federal law.

c. *Extension of enlistments and periods of service.* Upon declaration of war or national emergency by Congress, enlistments in force in the ARNGUS and USAR and periods of service of persons transferred to the USAR pursuant to law are automatically extended from the date on which they otherwise would expire to a date 6 months after the termination of the war or national emergency, whichever is later, unless sooner terminated by the Secretary of the Army (10 U.S.C. 511). Similarly, periods of active service are extended for the duration of any war and for 6 months thereafter unless sooner terminated by the Secretary of the Army (10 U.S.C. 671a). When Congress is not in session, the President may authorize extensions of enlistments and periods of active duty under the provision of 10 U.S.C. 671b.

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appropriate entries on personnel records. The personnel officer or other officer designated will authenticate the copy to the effect that entries have been accurately transcribed. It then becomes a record of the unit personnel section and will be disposed of as provided in AR 345-215 for units below division level, and AR 345-210 for units of division level and above.

(4) Copy No. 4 will be distributed as prescribed in Rule 1, Table 1-2, AR 335-60.

(5) For ARNGUS units, a copy will be forwarded to the adjutant general of the State concerned, and for USAR units, to the area commander having jurisdiction over the home station.

(6) For ARNGUS units, a copy of the initial morning report will be forwarded to the Chief, National Guard Bureau, ATTN: NG-ARP, Washington, DC 20310.

(7) For ARNGUS and USAR medical units a copy will be forwarded by airmail to The Surgeon General, ATTN: MEDPT-1, Department of the Army, Washington, DC 20315.

(8) For USAR Intelligence Corps and designated military intelligence units, a copy of the initial morning report will be forwarded to the Chief, Intelligence Corps, ATTN: Statistical and Reports Branch, Adjutant General, Fort Holabird, Maryland 21219. A copy of subsequent morning reports will also be forwarded as required by AR 381-101.

2-38. Members awaiting training or on active duty for training. a. *Reserve Enlistment Program of 1963 (REP-63) unit members awaiting training.* REP-63 unit members awaiting active duty for training at the time their units are ordered to active duty will be ordered to active duty with their units except as otherwise provided in paragraph 2-10a(9). Upon receipt of alert, unit commanders will report these members (name, grade, social security account number, and MOS to be trained in) through the area commander to the Commanding General, U.S. Continental Army Command, who will, at the earliest possible date after the effective date of unit order to active duty, reassign them to training centers for required

training. During the alert period also, these members will be medically examined if necessary (para 2-31b) and their records will be prepared and/or up-dated as prescribed by this section. DA Forms 201 (including DD Forms 722 and DA Forms 2143) for these members will be forwarded to training centers and returned to parent unit commanders as prescribed in AR 640-10. The provisions of b(1) below apply to these members.

b. *REP-63 members on active duty for training.*

(1) REP-63 members on active duty for training at the time their units are ordered to active duty and whose training tours will not extend beyond 6 months from the effective date of unit order to active duty will be carried on the Morning Report of the unit to which assigned as absent for the remainder of the period of training. Upon completion of training, members will report for duty to their assigned units. Absence of such members does not create vacancies in the units to which they are regularly assigned. If the unit of assignment has been deployed overseas prior to completion of the members' active duty for training tour, or if replacement of members is essential to permit the unit to attain readiness for deployment, the members will be reassigned to the training activity at which serving and reported for assignment instructions to the Chief of Personnel Operations, Department of the Army, Washington, DC 20310.

(2) Commanders of alerted units will notify direct, by letter, the commanding officer of the installation at which members of their units are serving on active duty for training, inclosing a copy of the orders bringing the unit on active duty. The letter of notification will specify that effective upon the date of unit entry on active duty as shown in the orders, the members concerned will change from an active duty for training to an active duty status. The letter will further indicate whether the members should be returned to the parent unit upon completion of training.

(3) The commanding officer of the installation at which the members are serving will notify them of their change in status and will

insure that the Morning Report prepared for the day prior to the date of entry on active duty includes the required morning report remark to relieve the members from active duty for training (ACDUTRA) as prescribed by Table 3-11, AR 335-60. On the effective date of entry on active duty of the parent unit, an entry will be made on the appropriate morning report (other than "SRCP") of the organization at which the members are performing training to indicate: "Attached from (insert unit to which assigned) for training duty (cite authority)." On the effective date of entry of the parent unit on active duty, each such member will be reported on the parent unit initial morning report as absent on training duty as prescribed by paragraph 2-37a(3).

(4) The commanding officer of the installation at which the members are undergoing training in an active duty status will, as soon as practicable, process the members as prescribed in this regulation and will insure that the records and reports required by this section are completed and forwarded to the members' parent unit commanders.

(5) Members on active duty for training whose training period will extend beyond 6 months from the effective date of unit order to active duty will be cleared from the rolls of alerted units after the effective date of unit order to active duty and their duty positions will be filled by fillers. Upon completion of training, such personnel will be reported for assignment instructions to Chief of Personnel Operations, Department of the Army, Washington, DC 20310.

c. *Leave to settle personal affairs.* Upon completion of training and prior to reporting to their parent units or first duty stations, members indicated in b(1) and (5) will be authorized, if the military situation permits, 10 days delay en route (excluding travel time) at their homes for the purpose of settling personal affairs.

2-39. Member at place other than permanent home address. a. If personnel records or other available evidence shows that a member of an ARNGUS or USAR unit will be at a place dis-

tant from his unit's home station on the effective date of the unit's entry on active duty, the unit commander will notify the area commander having jurisdiction over the home station. The area commander will issue individual orders ordering the member concerned to active duty (see paragraph 2-31 for medical examination) and directing him to proceed to his parent unit either at home station or mobilization station. A member whose temporary address is of record is entitled to permanent change of station allowances for his personal travel from such address to home station or mobilization station. If orders are received at a place other than that to which addressed, travel allowances are authorized from the place of receipt of orders to the place to which he reported, not to exceed entitlement from place to which orders were addressed to place to which he reported (JTR). Orders (TC Format 139, app I, AR 310-10) will show home of record, if applicable, current location (orders address), and will direct the member to report to his unit commander by telephone, telegraph, or other rapid means if he cannot report in person prior to midnight of the reporting date specified in the order.

b. If a member of an ARNGUS or USAR unit receives notice of the ordering of his unit to active duty when he is at a place distant from the unit's home station, he will immediately contact his unit commander for instructions or, if unable to do so, he will report to any nearby Army installation. The commander of the installation where the member reports will establish his identity and status and submit a letter (fig 2-5) in duplicate to the area commander having jurisdiction over the member's unit, requesting travel orders be issued. A copy of the letter will also be furnished the unit commander concerned. Airmail will be utilized, if appropriate.

c. Sample of letter to be submitted is shown in figure 2-5.

2-40. Member absent without leave. a. *Member who fails to report.* A member of an ARNGUS or USAR unit who is ordered to active duty under provisions of this regulation and fails to

vated for National Guard use at minimum cost. If a State chooses to lease vacated State-owned facilities covered under service contract, such facilities will be deleted from the service contract by contract change order which will be forwarded to the Chief, National Guard Bureau. State lease agreement for such facilities will insure that the facilities are returned to the State for National Guard use in the same condition that prevailed when the lease agreement was executed. A facility condition survey will be made by a qualified representative of the State prior to leasing of the vacated facilities, and two copies of the condition survey report will be forwarded to the Chief, National Guard Bureau with the contract change order deleting the facilities from the service contract.

(2) Annual field training site contracts for State-operated training sites will be reviewed by the State, and where mobilization will result in a reduction in the number of trainees scheduled to perform annual field training, a contract change order will be submitted to the Chief, National Guard Bureau, reducing the contract funding amount in proportion to the reduction in number of trainees, based on the current trainee funding support figure.

f. *Identification of contracts and leases.* In all reports prescribed by this paragraph, contracts, licenses, and leases will be identified by the contract or other identifying number, date, the name of the contractor, licensor or lessor, the site location, together with other appropriate data.

Section V. USAR MATTERS

2-55. Individual Ready Reserve. Members of the Individual Ready Reserve (formerly the Ready Reserve Mobilization Reinforcement Pool) will be ordered to active duty as prescribed in AR 135-301.

2-56. Area command control groups. Member of USAR Control Group (Delayed), USAR Control Group (ROTC), USAR Control Group (officer active duty obligor), and USAR Control Group (Delayed Entry) will be ordered to active duty as individuals by the area commanders when so directed by Headquarters, Department of the Army.

2-57. Other members of the USAR. Members of the Standby and Retired Reserves will be ordered to active duty as individuals as directed by Headquarters, Department of the Army (see AR 135-210).

2-58. Order to active duty of USAR units for control of civil disturbances. a. General.

(1) Under the provisions of the Russell Amendment (subsec. (e), Title I, DOD Approp. Act, 1967 (Pub. Law 89-687; 80 Stat. 981), as amended (sec. 303, Pub. Law 90-500; 82 Stat. 850)), USAR Ready Reserve units are

subject to order to active duty for control of civil disturbances or other purposes for periods of service not to exceed 24 months. The provisions of this statute do not authorize extension of terms of enlistment or service obligations for enlisted personnel. Enlisted personnel whose period of enlistment or Ready Reserve obligation expires during such service on active duty will be immediately discharged or released from active duty, as appropriate, unless they voluntarily extend or reenlist in the USAR. In the event the foregoing authority is relied upon or new legislation is enacted by the Congress to order USAR troop program units to active duty for control of civil disturbances, the administrative procedures set forth in the remainder of this and the following paragraph (2-59) will be employed.

(2) The processing of records and the accomplishment of administrative actions prescribed by this regulation will not interfere with the movement of units or the accomplishment of the unit mission. To facilitate completion of required administrative processing, the records listed below will, during an inactive status for those Army Reserve units with an assigned control of civil disturbance mission, be maintained at a level that will require in

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Forms 220; Standard Forms 88 and 89 (assemble in the order indicated).

(2) To: The Surgeon General

ATTN: MEDAS-S
Department of the Army
Washington, D.C. 20314

No. 3 copy of Standard Forms 88.

(3) To: State Director of Selective Service

(a) No. 4 copy of Standard Forms 88 of members who are selective service registrants and who have been found medically disqualified for active duty.

(b) Prior to forwarding, unit commanders will enter the selective service number under item 16 of this copy. The selective service number is indicated on DA Form 61 (Application for Appointment) or DD Form 4 (Enlistment Record). The State Director of Selective Service is indicated by the first element of the selective service number. The addresses of the State Directors of Selective Service are indicated in paragraph 4, AR 601-49.

(4) File in members DA Form 201 (Military Personnel Records Jacket, U.S. Army). No. 2 copy of DD Forms 220.

(5) File in members DD Form 722 (Health Record). No. 2 copy of Standard Forms 88.

f. Unit records. DA Form 1 (Morning Report) will be prepared and forwarded in accordance with AR 335-60 and the instructions contained in this paragraph.

(1) Rule 28, Table 4-5, Section III, AR 335-60, 25 January 1968, is applicable to preparation of the initial morning report to be accompanied by roster and orders as prescribed by Note 6, Table 4-5.

(2) The number of copies and distribution of morning reports will be as follows:

(a) Initial and final morning reports as prescribed by subparagraphs (1) through (6) of paragraph 2-37b of this regulation.

(b) Other morning reports during period of active duty as prescribed by subparagraphs (1) through (4) of paragraph 2-37b of this regulation.

(3) Rule 29, Table 4-5, Section III, AR 335-60, 25 January 1968, is applicable to preparation of the final morning report.

(4) Members who fail to report for duty will be carried as AWOL or placed in an excused absence status as appropriate, based on available information. The determination of excused absence status will be based on Reserve action prior to the effective time of order to active duty. Unit commanders will require members in an excused absence status to report immediately to their duty stations if they become available for duty during the period of order to active duty.

(5) Members engaged in training will be carried as TDY with station indicated. This includes members on full time training duty (ANACDUTRA) or engaged in REP-63 training.

(6) DA Form 1-1 (Personnel Data Change Report) will not be prepared.

g. Pay.

(1) All changes to a member's status that will affect entitlement to pay and allowances will be verified by the unit commander and filed in the member's DA Form 2143 (Financial Data Records Folder).

(2) DA Form 2143 for each member will be retained by the unit.

(3) All entitlements to pay and allowances will be entered on a military pay voucher prepared for each member and substantiated or supported by appropriate documentation as required by AR 37-104-2 or AR 37-125. Payrolls will be forwarded to the finance and accounting officer designated by the Army commander for computation and payment.

(4) Allotments, except Class "Q" will not be initiated where the anticipated period of active duty is for 6 months or less.

(5) DA Form 3053 (Declaration of Benefits Received and Waivers) will be prepared in duplicate by each member if not already in DA Form 2143 (Financial Data Records Folder). For members receiving a pension, retired or retirement pay, the original will be forwarded to the office having jurisdiction over the claim

CHAPTER 3

CALL TO ACTIVE DUTY

3-1. Status of Army National Guard while on active duty under CALL. When any or all parts of the Army National Guard enter on active duty under CALL, they become a component of the U.S. Army but their units and members retain their status as federally recognized units and members of the Army National Guard. The Army National Guard while on active duty under CALL may be employed in any territory in which the laws of the United States have effect, and may also be employed in foreign territory for limited purposes such as to forestall evident intent of invasion or to defeat a hostile force which has made, attempted, or threatened an invasion. Under a Presidential CALL, officers of the Army National Guard continue to be appointed by the State, territories, Commonwealth of Puerto Rico or the District of Columbia (Article 1, Section-8, Clause 16, Constitution of the United States); and neither officers nor enlisted men may be held to serve beyond the terms of their existing commissions or enlistments.

3-2. Regulations governing units and members of the Army National Guard on active duty under CALL. *a. Laws and regulations governing the Active Army.* Units and members of the Army National Guard on active duty under CALL become subject to the laws and regulations governing the active Army so far as they are applicable to officers and enlisted personnel whose permanent retention in the military service is not contemplated. For example, certain Army regulations governing training, supply, pay, fiscal procedures, and other matters will apply after entry on active duty under CALL and certain National Guard regulations covering these same matters will cease to apply on the effective date of the CALL except as indicated in *b* below (10 U.S.C., 3499).

b. National Guard regulations governing appointment, promotion, and separation of officers and warrant officers to continue in effect. Those portions of National Guard regulations in effect on the effective date of CALL that govern the appointment, promotion, and separation of officers and warrant officers of the Army National Guard will continue to apply to such officers and warrant officers while on active duty under CALL except as otherwise indicated herein.

3-3. Recruiting of enlisted personnel for Army National Guard under CALL. *a. Recruiting procurement objectives.* Within the limitations of procurement objectives prescribed by Headquarters, Department of the Army mobilization programs or plans, recruiting for the Army National Guard under CALL will be governed by current instructions from Headquarters, Department of the Army in accordance with the demands of the particular situation causing issuance of the CALL,

b. States to obtain recruits.

(1) The several States will provide for the procurement and assignment of the required number of recruits to their own units alerted for active duty under CALL. This recruiting will be conducted, in general, under the supervision of the area commander concerned.

(2) No recruits will be sworn in on the effective date of entry on active duty without the approval of Headquarters, Department of the Army.

c. Dual oath to be administered. Personnel recruited for the Army National Guard under CALL will have a State status as members of the federally recognized National Guard. The

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dual oath prescribed by 32 U.S.C., 304 will be administered.

3-4. Form of communication for CALL. The form of communication for CALL of Army National Guard units and members thereof will be worded as indicated in TC 101, appendix I, AR 310-10.

3-5. Call to active duty for control of civil disturbances. *a. General.* Civil disturbances are among the occasions on which the President may call ARNG units to active duty (see para 1-4b for other occasions of call to active duty for which provisions of this paragraph will apply). The time served on active duty may vary from one day to six months or longer. The urgency of civil disturbances is self-evident and it is imperative that units be prepared to move to designated assembly stations or duty stations (the committed forces) within the shortest period of time and by the fastest means available. The processing of records and the accomplishment of administrative actions prescribed by this regulation will not interfere with the movement of units or the accomplishment of the unit CALL mission. To facilitate completion of required administrative processing, the records listed below will, during an inactive status, be maintained at a level that will require in the event of CALL only terminal entries such as signatures, effective date of CALL, and personal and military details current immediately before the CALL. Similarly, required administrative actions will be prepared in advance insofar as possible and be pre-positioned for immediate dispatch and/or completion as required.

b. Medical examinations.

(1) On occasion of call to active duty members of ARNG units will be medical examined as outlined below:

(a) Each member will undergo a Type "A" medical examination after the call to active duty as prescribed by chapter 10 and appendix IX, AR 40-501 unless an examination of that scope was accomplished within one year of the effective date of the call and the complete report is a matter of official record.

Members who desire an examination or who question their medical fitness for active duty will be examined, regardless of previous reports of medical examinations of record. Those not required to be examined under this provision will complete the "Statement of Physical Condition" (Statement No. 1) on DD Form 220.

(b) If on active duty for less than 30 days, each member must undergo a Type "A" medical examination prior to release from Federal service unless such an examination was actually accomplished after entry on active duty under the call. In cases where a medical examination has been accomplished since the call, the "Statement of Physical Condition" (Statement No 2) on DD Form 220 will be accomplished prior to release from Federal service.

(c) If on active duty for more than 30 days, each member must undergo a Type "A" medical examination prior to release from Federal service, whether or not such an examination was accomplished at the time of call.

(d) Aviation personnel on flying duty and Marine Divers will be medically examined for entry on active duty as indicated in (a) above except that the medical examinations to be accomplished will be a Type "B" examination as prescribed in chapter 10 and appendix IX, AR 40-501.

(e) Medical examination prior to release from Federal service of aviation personnel on flying duty will be accomplished as prescribed in (b) and (c) above. This medical examination will be a Type "A" examination.

(2) The results of the medical examination will be recorded on Standard Form 88 (Report of Medical Examination). Three copies of SF 88 will be prepared for each member except that four copies will be prepared for members who are selective service registrants and who have been found medically disqualified for active duty. Standard Form 89 (Report of Medical History) will be prepared by each member in original only.

(3) For medically disqualified members, all copies of Standard Form 88 and Standard

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ers will report such members (name, Social Security Account Number, and effective date of call) to the training installation commanders. Unit commanders will distribute DD Forms 220 as prescribed in e below.

(2) Identification Tags previously issued to members will continue to be used. Other members who are expected to be retained on active duty for 30 days or longer will be provided Identification Tags as prescribed in AR 606-5.

(3) DD Form 1172 (Application for Uniformed Services Identification and Privilege Card) for dependents will be prepared in duplicate for members who are expected to be retained on active duty for 30 days or longer (see NGR 10 and AR 606-5). Both copies of verified application form will be forwarded to the principal dependent who may obtain DD Form 1173 (Uniformed Services Identification and Privilege Card) from the nearest uniform service installation.

(4) Copies of orders issued and all reports and returns rendered by headquarters of administrative units, such as battalions and divisions on active duty under CALL as required by this or other applicable regulations, will be sent to the adjutant general of the State from which the units were called.

e. *Group disposition of records and related actions.* Records for each member will be assembled, securely fastened, and disposed of as indicated below not later than 10 days after termination of the call.

(1) To: Commanding Officer

U.S. Army Administration
Center
9700 Page Boulevard
St. Louis, Missouri 63132

No. 2 copy DD Form 214, original copy of DD Form 220; Standard Forms 88 and 89 (assemble in the order indicated).

(2) To: The Surgeon General

ATTN: MEDAS-S
Department of the Army
Washington, DC 20315

No. 3 copy of Standard Form 88.

(3) To: State Director of Selective Service

(a) No. 4 copy of Standard Form 88 of members who are selective service registrants and who have been found medically disqualified for active duty.

(b) Prior to forwarding, unit commanders will enter the selective service number under item 16 of this copy. The selective service number is indicated on DA Form 61 (Application for Appointment) or DD Form 4 (Enlistment Contract). The State Director of Selective Service is indicated by the first element of the selective service number. The addresses of the State Directors of Selective Service are indicated in paragraph 4, AR 601-49.

(4) File in members' DA Form 201 (Military Personnel Records Jacket, U.S. Army). No. 2 copy of DD Form 220.

(5) File in members' DD Form 722 (Health Record). No. 2 copy of Standard Form 88.

f. *Unit records.* DA Form 1 (Morning Report) will be prepared and forwarded in accordance with AR 335-60 and the instructions contained in this paragraph.

(1) Rule 28, table 4-5, section III, AR 335-60, 25 January 1968, is applicable to preparation of the initial morning report to be accompanied by roster and orders as prescribed by note 6, table 4-5.

(2) The number of copies and distribution of morning reports will be as follows:

(a) Initial and final morning reports as prescribed by subparagraphs (1) through (6) of paragraph 2-37b of this regulation.

(b) Other morning reports during period of active duty as prescribed by subparagraphs (1) through (4) of paragraph 2-37b of this regulation.

(3) Rule 29, table 4-5, section III, AR 335-60, 25 January 1968, is applicable to preparation of the final morning report.

(4) Members who fail to report for duty will be carried as AWOL or placed in an excused absence status, as appropriate, based on

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available information. The determination of excused absence status will be based on state action prior to the effective time of the call. Unit commanders will require members in an excused absence status to report immediately to their duty stations if they become available for duty during the period of the call.

(5) Members engaged in training will be carried as TDY with station indicated. This includes members on full time training duty (FTTD) or engaged in REP-63 training.

(6) DA Form 1-1 (Personnel Data Change Report) will not be prepared.

g. Pay.

(1) All changes to a member's status that will affect entitlement to pay and allowances will be verified by the unit commander and filed in the member's DA Form 2143 (Financial Data Records Folder).

(2) DA Form 2143 for each member will be retained by the unit.

(3) All entitlements to pay and allowances will be entered on a military pay voucher prepared for each member and substantiated or supported by appropriate documentation as required by AR 37-104-2 or AR 37-125. Payrolls will be forwarded to the finance and accounting officer designated by the Army commander for computation and payment.

(4) Allotments, except Class "Q", will not be initiated when the anticipated period of active duty under CALL is for 6 months or less.

(5) DA Form 3053 (Declaration of Benefits Received and Waivers) will be prepared in duplicate by each member if not already in DA Form 2143 (Financial Data Records Folder). For members receiving a pension, retired or retirement pay, the original will be forwarded to the office having jurisdiction over the claim (Veterans Administration or Retired Pay Division, Finance Center, Indianapolis, Indiana 46249). The duplicate will be filed in the member's Financial Data Records Folder. For members not receiving a pension, retired or retirement pay, the original will be filed in the member's Financial Data Records Folder and the duplicate will be destroyed.

3-6. Replacements for units CALLED to active duty for control of civil disturbances. *a.* Army National Guard units called to active duty will requisition replacements from active Army personnel resources to replace losses incurred following the effective date of the call. Unit commanders will requisition replacements in accordance with instructions outlined in AR 614-185 and AR 614-202. Based on the nature and estimated duration of the situation requiring the call, Department of the Army will determine whether it is necessary to fill all or part of the requisition.

b. Commanders of Army installations directed to provide replacements for ARNG units will insure that such personnel have physical and MOS qualifications commensurate with the needs of the receiving unit; and that needed administrative records (DA Form 201, Military Personnel Records Jacket U.S. Army; DA Form 2143, Military Personnel Financial Data Records, U.S. Army; DD Form 722, Health Record; and DD Form 722-1, Health Record—Dental) are forwarded (hand-carried by individual replacements) to the receiving unit. Replacements will be sent to the duty station of the receiving unit. Upon termination of the call to active duty, ARNG unit commanders will report replacements for reassignment instructions to Chief of Personnel Operations, Department of the Army, Washington, DC 20310, ATTN: Career Branch for commissioned officers and warrant officers; ATTN: EPADS for enlisted personnel in pay grades E-7 through E-9, intelligence, and special category personnel; ATTN: EPADR-CA, for other enlisted personnel in MOS occupational area 1; and ATTN: EPADR-MT for enlisted personnel in MOS occupational areas 7 through 0.

3-7. Transfer and attachment of members on active duty under CALL. *a.* Members may be transferred (permanently assigned) by the appropriate military commander to a unit inducted from the Army National Guard of his own State but may not be transferred to a unit not from the Army National Guard of his own State.

b. Members may be attached for duty by the appropriate military commander to any

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ONLY COPY AVAILABLE

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